FRANCISCO SUÁREZ

A TREATISE ON LAWS AND GOD THE LAWGIVER

BOOK III

ON POSITIVE HUMAN LAW

Of the thirty-four chapters in this Book, only the following are included in these *Selections*: Chapters I–IV (inc.), XXXII, and XXXIII

BOOK III

ON POSITIVE HUMAN LAW AS SUCH, AND AS IT MAY BE VIEWED IN PURE HUMAN NATURE, A PHASE OF LAW WHICH IS ALSO CALLED CIVIL

[INTRODUCTION]

1. In the First Book we divided temporal law into the natural and the positive, and consequently, since the eternal law and natural temporal law have been discussed, the discussion of the positive [temporal] law should follow.

However, in that very passage, [Bk. I, chap. iii, § 14,] we subdivided this phase into the divine and the human. Of these, the divine is in truth the more noble and the worthier, but the human is better known to us, and closer to [human] nature, since it pertains to the same order. Accordingly, as the existence of nature is presupposed for the existence of grace, so human law by its very nature is prior in the order of its generation to divine law, since the latter is supernatural and relates to the order of grace. Therefore, we shall treat of human law before treating of divine law.

And as to positive law in its general aspect, apart from any division into divine and human, this is a matter which we need not discuss. For, aside from its mode of origin, which is explained in the negative statement that the precepts of positive law, whether divine or human, are characterized not by an intrinsic necessity, existing in themselves, but by a necessity resulting from an extrinsic will—aside from this fact, I say, and aside from the statements relating to law in general which were made in the First Book—practically nothing remains to be said, of a general nature, that would be useful as practical doctrine or even possessed of any speculative significance.

Moreover, when both the human and the divine branches of positive law have been explained, all the questions pertaining to their mutual accord or distinction that might call for discussion, will have been explained.

2. However, in the opinion of Justinian (*Institutes*, I. ii. 1), human law (*lex*) may be divided into that which pertains to common law (*ius*) and that which pertains to the particular law (*ius*) [of a single community].

Human law (*lex*) is divided into that which is common law (*ius*) and that which pertains to the particular law (*ius*) [of a single community].

The former relates to the *ius gentium* and is comprehended within that term. We have already discussed that phase of law sufficiently.

At present, therefore, we are dealing with particular human law

[of individual communities] to which the name of positive human law has been applied, and which is said to be peculiar to any given state, commonwealth or similar perfect community.

Human law is divided into civil and canon.

Accordingly, human law of this kind is in turn divided into civil and canon. For though canon law is of itself capable of being common to the whole world, even as the Catholic Church is universal, nevertheless, in point of fact, it is a law peculiar to the community of the Church of Christ, and not common to all nations, since they are not all a part of the Church. Furthermore, in the manner of its enactment, it is positive human law in the strict sense, and of a very different character from that of the *ius gentium*, while in many respects it bears a likeness to the civil law. For these two branches of law agree in the fact that both in common possess the character of positive human law. One may note, however, that there exists between them a difference, consisting in the fact that civil law pertains entirely to the natural order in so far as regards its origin and authority, for though it is not enacted directly by nature, it is nevertheless enacted through the authority connatural to man. Canon law, on the other hand, is properly speaking, that law which is enacted by man through a supernatural authority.

Therefore, following the order of doctrine, and beginning with those points which are easier to comprehend, we deem it advisable to speak of civil law before speaking of canon law. We shall, however, dis- 197
cuss the common basis of positive human law, in connexion with civil law. For the doctrine will thus be grasped more readily and will easily be adapted to the canon law by the addition of those elements which befit the latter because of its supernatural authority, a matter which we shall take up in the following Book.[1]

From the foregoing, it also follows that, within the civil law itself, two states may be distinguished: one, the civil law in itself, simply as it existed among the Gentiles and exists now among unbelievers; the other, civil law as it exists when joined with faith and as it may be practised among believers in the Christian Church. These two states differ only in non-essentials, and therefore, we shall speak of civil law in a general sense. However, when any special point arises, calling for explanation, we shall not pass it by, but shall adapt the general doctrine to the present state of the Church.

CHAPTER I

DOES MAN POSSESS THE POWER TO MAKE LAWS?

1. We are speaking (as I have said) of man's nature and of his legislative power viewed in itself; for we are not considering, at present,

[1] [Not included in these *Selections*.—Tr.]

the question of whether anything has been added to or taken from that power through divine law, a matter which will be taken up later.

The question under consideration, then, is as follows: is it possible —speaking solely with reference to the nature of the case[1]—for men to command other men, binding the latter by [man's] own laws?

A reason for doubting that they can do so, may lie in the fact that man is by his nature free and subject to no one, save only to the Creator, so that human sovereignty is contrary to the order of nature and involves tyranny.

This doubt is confirmed by history; for [such sovereignty] was in point of fact thus introduced, and it is written (*Genesis*, Chap. x [, vv. 8, 10]) of Nemrod: 'he began to be mighty on the earth. [. . .] And the beginning of his kingdom was Babylon'—that is to say, his kingdom began through force and might. Similarly, Lucan [*The Civil War*, Bk. X, line 21] said of Alexander that he was, 'A fortunate freebooter'. This was the meaning of Augustine, also, in his *Augustine.* work *On the City of God* (Bk. IV, chap. iv). Thus it is that we read in *Osee.* *Osee* (Chap. viii [, v. 4]): 'They have reigned, but not by me: they have been princes, and I knew not [. . .].'

Secondly, the same doubt is confirmed by the words of Augustine, who discusses (*On the City of God*, Bk. XIX, chap. xv) the fact that God said (*Genesis*, Chap. i [, v. 26]): 'Let us make man', &c., *Genesis.* 'and let him have dominion over the fishes of the sea, and the fowls of the air, and the beasts [and the whole] earth'[2]; whereas He did not say: 'Let him have dominion over men', a distinction which indicates that such domination is not natural to man. 'Therefore,' says [Augustine, *ibid.*], 'the first just men were not kings, but shepherds of flocks, and they were so called.' Thus Gregory the Great, too, indicates (*Moralia*, Bk. XXI, chap. x, or xi [*Libri sive Expositio in Lib. B. Job*, Bk. XXI, chap. xv] and in the *Regulae Pastoralis*, Pt. II, chap. vi) that authority of this kind was introduced through sin and acquired through usurpation.

Thirdly, the doubt may be confirmed by the testimony of a number of passages which show that God alone is the king, the lawgiver and the lord of men.[3] 'For the Lord is our judge, the Lord is our king, the Lord is our lawgiver' (*Isaias*, Chap. xxxiii, v. 22). And again, *Isaias.* 'There is one lawgiver, and judge', &c. (*James*, Chap. iv [, v. 12]). *James.*

Finally, we have this confirmation, namely: there is no true law save that which is binding in conscience; but one man cannot bind another in conscience, since this power would seem to be exclusively a property of God, Who alone can save and destroy; therefore, . . .

[1] [With reference to a power inherent in human nature.—Tr.]

[2] [Suárez has simply *bestiis terrae* (the beasts of the earth) in the place of the Vulgate reading, *bestiis, universaeque terrae*.—Tr.]

[3] [Reading *dominum* for *dominium*.—Tr.]

2. At this point, mention might be made of various errors among the heretics; but it will be better to touch upon those errors later.

Accordingly, leaving them aside, we shall make first the following statement: a civil magistracy accompanied by temporal power for human government is just and in complete harmony with human nature. This conclusion is certainly true, and a matter of faith. It may be sufficiently proved by the example set by God Himself, when He established a government of this kind over the Jewish people, first by means of judges, and later by means of kings, endowed doubtless with the princely office and temporal power, and held in such veneration that they were even called gods, according to the passage in *Psalms* (lxxxi [, v. 1]): 'God hath stood in the congregation of gods: and being in the midst of them he judgeth gods.' Nor is there any validity in the objection which may be made that those judges and kings had their power from God Himself; for that power nevertheless did not in itself exceed the limits set by nature, even though the mode through which it was held was extraordinary and the result of a special providence; and therefore, this [divine derivation of the power in question] does not render it impossible for the power to be held justly in some other way. Furthermore, from that same contention there follows this argument, namely, that power of that kind is in harmony with nature itself, in so far as it is necessary to the proper government of a human community.

The affirmative conclusion, which is a matter of faith.

Again, this contention derives a fuller confirmation from human custom, since kings existed long before the times of which we were speaking, even kings who were holy and praised in the Scriptures, as was Melchisedech (*Genesis*, Chap. xiv and *Hebrews*, Chap. vii). Abraham, too, is thought to have been a king or sovereign prince. Moreover, a like example is to be found in *Job*, &c.

Genesis. *Hebrews.*

And finally, we read in *Proverbs* (Chap. viii [, v. 15]) the general statement: 'By me kings reign.'

Proverbs.

The point is clearly set forth in the writings of the Holy Fathers, to whom I shall refer in the course of our discussion.

Aristotle.

3. The basic reason for this assertion is to be sought in Aristotle's *Politics* (Bk. I [, chap. v = p. 1254 B]). This reason is expounded by St. Thomas (*Opuscula*, XX: *De Regimine Principum*, Bk. I, chap. i), and also, very neatly, by St. Chrysostom (*On First Corinthians*, Homily XXXIV [, no. 5]). It is founded, moreover, upon two principles.

The basic reason for the assertion.

Chrysostom.

198

The first principle is as follows: man is a social animal, and cherishes a natural and right desire to live in a community. In this connexion, we should recollect the principle already laid down, that human society is twofold: imperfect, or domestic; and perfect, or political. Of these divisions, the former is in the highest degree natural and (so to speak)

fundamental, because it arises from the fellowship of man and wife, without which the human race could not be propagated nor preserved; wherefore it has been written, 'It is not good for man to be alone'. From this union there follows as a direct consequence the fellowship of children and parents; for the earlier form of union is ordained for the rearing of the children, and they require union and fellowship with their parents (in early life, at least, and throughout a long period of time) since otherwise they could not live, nor be fittingly reared, nor receive the proper instruction. Furthermore, to these forms of domestic society there is presently added a connexion based on slavery or servitude and lordship, since, practically speaking, men require the aid and service of other men.

Now, from these three forms of connexion there arises the first human community, which is said to be imperfect from a political standpoint. The family is perfect in itself, however, for purposes of domestic or economic government.

But this community—as I have already indicated, above—is not self-sufficing; and therefore, from the very nature of the case, there is a further necessity among human beings for a political community, consisting at least of a city state (*ciuitas*), and formed by the coalition of a number of families. For no family can contain within itself all the offices and arts necessary for human life, and much less can it suffice for attaining knowledge of all things needing [to be known].

Furthermore, if the individual families were divided one from another, peace could scarcely be preserved among men, nor could wrongs be duly averted or avenged; so that Cicero has said (*De Amicitia*)[1]: 'Nothing in human affairs is more pleasing to God our Sovereign, than that men should have among themselves an ordered and perfect society, which (continues Cicero) is called a city state (*ciuitas*).' Moreover, this community may be still further augmented, becoming a kingdom or principality by means of the association of many city states; a form of community which is also very appropriate for mankind—appropriate, at least, for its greater welfare—owing to the above-stated reasons, applied in due proportion, although the element of necessity is not entirely equal in the two cases.

4. The second principle is as follows: in a perfect community, there must necessarily exist a power to which the government of that community pertains. This principle, indeed, would seem by its very terms to be a self-evident truth. For as the Wise Man says (*Proverbs*,

In a perfect community, there must necessarily exist a power governing that community.

Proverbs, xi.

[1] [This passage is not found in *De Amicitia*. A very similar passage is found in Cicero's *De Republica*, Bk. VI, chap. xiii, which reads: *nihil est enim illi principi deo, qui omnem hunc mundum regit, quod quidem in terris fiat, acceptius quam concilia coetusque hominum iure sociati, quae ciuitates appellantur* (For nothing of all that is done on earth is more pleasing to that supreme God who rules all this world than the assemblies and gatherings of men associated in justice, which are called States).—TR.

Chap. xi [, v. 14]): 'Where there is no governor, the people shall fall'; but nature is never wanting in essentials; and therefore, just as a perfect community is agreeable to reason and natural law, so also is the power to govern such a community, without which power there would be the greatest confusion therein.

This argument is confirmed by analogy with every other form of human society. For the union of man and woman, since it is natural, consequently involves a head, the man, according to this passage from *Genesis* (Chap. iii [, v. 16]): '[. . .] thou shalt be under thy husband's power.' Thus it is that Paul says (*Titus*, Chap. ii [, v. 5]): 'Let women be subject to their husbands.'[1] To this, Jerome [on *Titus*, Chap. ii, v. 5] adds the words: 'in accordance with the common law of nature.' Similarly, in that second relationship of parents and children, the father has over his child a power derived from nature. And in the third, the relationship of servants and master, it is also clear that a governing power resides in the master, as Paul teaches [*ibid.*, v. 9], also in *Ephesians*, Chap. vi [, v. 5] and *To the Colossians*, Chap. iii [, v. 22]), saying that servants ought to be obedient to their lords, as to God. For though the relationship of servitude is one derived not entirely from nature, but rather through human volition, nevertheless, given the existence of this relationship, subordination and subjection are obligatory by natural law, on the ground of justice. Filial subjection, too, is supported by this same natural bond and basis, that is to say, natural origin, from which it derives a higher degree of perfection by the title of [filial] piety. This point, moreover, is emphatically brought out in the Fourth Commandment of the Decalogue.

Genesis. *Titus.* Jerome. *Ephesians.* *Colossians.*

Finally, it follows from all this, that in a domestic community, or family, there exists by the very nature of the case, a suitable power for the government of that community, a power residing principally in the head of the family. Furthermore, the same situation is necessarily found to exist in the case of any community whatsoever that consists of one sole household, even though that community be founded, not upon the bond of matrimony, but upon some other kind of human society; and therefore, it is likewise necessary, in the case of a perfect society, that there shall exist some governing power suitable thereto.

St. Thomas.

5. There is, in fine, an *a priori* reason in support of this view, a reason touched upon by St. Thomas in the *Opuscula* [XX: *De Regimine Principum*, Bk. I, chap. i] above cited, namely: that no body can be preserved unless there exists some principle whose function it is to provide for and seek after the common

The reason *a priori*.

[1] [Suárez probably had reference to *Ephesians*, Chap. V, v. 22, of which this passage is a direct quotation. The passage in the *Epistle to Titus* reads: *Ut . . . doceant adolescentulas . . . subditas viris suis* (That they may teach the young women . . . to be obedient to their husbands).—Tr.]

good thereof, such a principle as clearly exists in the natural body, and
199 likewise (so experience teaches) in the political. The reason for this fact, in turn is also clear. For each individual member has a care for its individual advantages, and these are often opposed to the common good, while furthermore, it occasionally happens that many things are needful to the common good, which are not thus pertinent in the case of individuals and which, even though they may at times be pertinent, are provided for, not as common, but as private needs; and therefore, in a perfect community, there necessarily exists some public power whose official duty it is to seek after and provide for the common good.

The righteousness of and necessity for civil magistracy are clearly to be deduced from the foregoing, since the term 'civil magistracy' signifies nothing more nor less than a man or number of men in whom resides the above-mentioned power of governing a perfect community. For it is manifest that such power must dwell in men, inasmuch as they are not naturally governed in a polity by the angels, nor directly by God Himself, Who acts, by the ordinary law, through appropriate secondary causes; so that, consequently, it is necessary and natural that they should be governed by men.

6. I hold, secondly, that a human magistracy, if it is supreme in its own order, has the power to make laws proper to its sphere; that is to say, civil or human laws which, by the force of natural law, it may validly and justly establish, provided that the other conditions essential to law be observed.

The second conclusion.

This conclusion is certainly true; and it has, moreover, been laid down by the philosophers—by Aristotle (*Politics*, Bk. I throughout and *Ethics*, Bk. X, last chapter), by Plato (*Laws* [Bk. III, p. 684 c] and *The Republic* [Bk. I, chap. xii = p. 339]) and by Cicero (*On Invention*, Bk. I [, chap. i] and *Laws* [Bk. I, chap. vi]). The theologians, too, and other Doctors whom I have cited above (Bk. I, chap. viii)[1] agree with the conclusion in question. A great deal of support may also be drawn from Covarruvias (*Practicae Quaestiones*, Chap. i; and on *Sext*, rule *peccatum*, Pt. II, § 9, no. 6).

Aristotle. Plato. Cicero. Covarruvias.

Moreover, the reason [on which the said conclusion is based,] is as follows: a civil magistracy is a necessity in the state for its government and regulation, a fact which has already been pointed out; but one of the most necessary acts is the establishment of law, as is evident from what we have said above (Book One); therefore, this legislative power does exist in a political magistracy. For he who is invested with a given office, is invested with all the power necessary for the fitting exercise of that office. This is a self-evident principle of law.

The proof of the [second] conclusion.

[1] [Not included in these *Selections*.—Tr.]

A corollary.

[7.] Whence it follows that such power to make human laws is identified with the human magistracy endowed with supreme jurisdiction in the state.

This fact is evident from what has already been said (in Bk. I, chap. viii),[1] where we showed that the power in question pertains to a perfect jurisdiction. That entire discussion should be applied here. Moreover, it holds true in a universal sense. For solely in the prince, or [supreme] magistrate, does that public power reside which is ordained for public action, concerns the community as a whole, and includes an efficacious binding and compelling force; yet this twofold force is essential to law, according to Aristotle (*Ethics*, Bk. X, last chapter), the *Digest* (I. iii. 7), and, also, the proof adduced above; and therefore, only that magistrate who has supreme power in the commonwealth, has also the power to make human, or civil law. Finally, this supreme power is a certain form of dominion, but a form of dominion that calls, not for strict servitude to a despot, but rather for civil obedience; therefore, it is the dominion of jurisdiction, of the sort that resides in the prince, or king.

Aristotle.

8. Certain jurists, however, qualify these statements, declaring that it is true of the precepts of the law which is commonly applicable or relative to a [whole] kingdom, but that it is not true of municipal precepts, or statutes relating to particular communities;[2] a qualification which may be encountered in referring to Felinus and to the authorities whom he cites in his commentary (on *Decretals*, Bk. I, title II, chap. vi, nos. 9 and 10). These jurists base their opinion upon the contention that many communities not possessing jurisdiction do possess the power to make statutes. Their argument may be confirmed by the fact that the civil laws often distinguish jurisdiction from sovereignty, that is to say, from the power of sovereign command, as one may gather from the *Digest* (L. i. 26 and II. i. 3); but law, properly speaking, is related to the power of sovereign command, as may easily be seen from what we have already said regarding the essence of law; and therefore, the power which is *per se* necessary to law, is not the power of jurisdiction.

Felinus.

Objections to the corollary.

9. Nevertheless, the reply is that this qualification is unnecessary, unless, perchance, there is some ambiguity in the use of terms. For the arguments above set forth furnish universal and unqualified proof. St. Thomas makes this clear in the passage (II.-II, qu. 67, art. 1) where he proves that jurisdiction is necessary in order to pass a sentence for the reason that jurisdiction is necessary to law, because a sentence is a particular law and also has coercive force; and thus, *a fortiori*, any law

St. Thomas.

[1] [Not included in these *Selections*.—Tr.]

[2] [*statutis particularium populorum*. The translation, 'communities', would seem to be justified here by the necessity for a contrast with *regni* (kingdom), above, as well as by the appearance of *Communitates* (communities) in the next sentence.—Tr.]

howsoever particular its character may seem, requires jurisdiction; for no [other] law is ever so particular in character as a sentence, and the latter always has or always should have annexed to it some means of coercion—as is evident from the *Ethics* of Aristotle (as cited above) and from the laws already mentioned—since directive without coercive force is of no value. Indeed, no one has ever doubted that jurisdiction is required for the passing of a sentence. And thus our contention is confirmed; for if jurisdiction is necessary for the declaration of law, it is much more necessary for the making of law.

Aristotle.

10. As to the fundamental position of the authors in question, the [basic] assumption which they make may be denied. For statutes are either not true laws or else not made without jurisdiction; points which will be accorded more attention in later pages.

The objections to the corollary are answered.

As for the confirmation, in so far as concerns the laws cited in that [confirmatory argument], I shall point out that the term 'jurisdiction', in the full and proper sense, refers to political—that is, governmental—power of dominion, the sense in which we are here using the word. And jurisdiction, thus interpreted, is included as intrinsically a part of political sovereignty, in order to differentiate the latter from tyranny. Such is the argument set forth in the *Decretum* (Pt. II, causa XXIII, qu. i, can. iv), in the passage where supreme governmental power over the state is called 'legitimate sovereignty' (*legitimum imperium*); and the degree and mode of sovereignty will be in accordance with the degree and mode of jurisdiction. Sometimes, to be sure, 'jurisdiction' is understood strictly according to the etymology of the term, as signifying the simple power of passing judgment. For law is properly declared, or interpreted, by means of a sentence; and, if one is speaking in this sense, it is not incongruous that the power to judge should reside in a given person apart from the legislative, although such a person is never without some coercive power, such as would seem at times to be denoted by the word 'sovereignty', when the latter, also, is strictly interpreted. Thus it is that, on the other hand, the power given to the magistrate for the punishment of crimes and extending even to the death penalty, is ordinarily spoken of in the civil law simply as sovereignty, and is apparently so treated in the laws above mentioned, as well as in another law of the *Digest* (L. xvi. 215). In such cases, moreover, it is customary to give this power the name of 'unmixed sovereignty' (*merum imperium*), as may be seen by consulting the *Digest* (II. iv. 2) and the Gloss (thereon;[1] and on similar passages); although, in point of fact, it is impossible that such sovereignty should exist apart from the power of jurisdiction, just as, conversely, it is impossible for jurisdiction to exist apart from every element of sovereignty. This

[1] [The words of the Gloss are: *Imperium, s. merum quod est gladii potestas*.—Revisers.]

point is brought out in that passage of the *Digest* (I. xxi. 5)[1] which declares that when jurisdiction has been given, a certain element of sovereignty is also given, 'For there is no jurisdiction without a measure of coercive power.'

Relatively speaking, then, these two attributes are separated, not in actual fact, but only in a certain usage of the terms; so that the legislative power, being—as it is—a power of sovereign command, is accordingly one of jurisdiction.

The objections to the first conclusion are answered.

11. So it is that, in so far as concerns the reason for doubt,[2] the deduction [involved in that reason] is denied. For though man was not created or born subject to the power of a human prince, he has been born potentially subject (as it were) to such power; and therefore, it is not in opposition to preceptive natural law that one should be thus subjected in fact, even though this subjection is not derived directly from nature. On the contrary, it is consonant with natural reason that a human commonwealth should be subjected to some one, although (as we shall see) natural law has not in and of itself, and without the intervention of human will, created political subjection.

It is [merely] an accidental quality of human principates that empires have been established tyrannically.

With regard to the first confirmation of the doubt, we admit that empires and kingdoms have often been established or usurped through tyranny and force; but we deny that this fact is due to the essential character, or nature, of such principates, tracing it rather to the abuse of man. Consequently, we furthermore deny that kingdoms were established in this fashion from the very beginning, a denial which has already been supported by means of examples. Moreover, the words of Osee, quoted above,[3] referred specifically to the kings of Israel, who were set up without the sanction of God's Will, as Ribera explains at length, when expounding this passage [in his *Commentarii in 12 Prophetas Minores*]. These words may, however, be applied to all tyrants, or to all persons who rule unjustly even though they be true kings, or to those who are ambitious to govern though they are unworthy and unfitted to do so. Such persons, indeed, are frequently spoken of as reigning not by God, and not because they are false kings but because they rule in a way that fails to accord with God's will, or else for the reason that God permits rather than ordains their elevation to such office, a point which is made by Origen (*Homilies*, IV, *On Judges*).

[1] [The title of this Chapter in the *Digest* reads: *De officio eius, cui mandata est iurisdictio*, not *De eo, cui mandat. est iurisd.*, as it is given in the text of Suárez.—Tr.]

[2] [i.e. the reason (set forth in the third paragraph of Section 1 of this Chapter) for doubting the general proposition that man possesses the power to make laws.—Tr.]

[3] [In Section 1 of this Chapter. The passage quoted is from *Osee*, Chap. viii, v. 4: 'They have reigned, but not by me: they have been princes, and I knew not: [. . .]'.—Tr.]

Human principates did not originate with nature, but neither are they contrary to nature.

12. As to the second confirmation, that drawn from Augustine [*supra*, Section 1 of this Chapter], I reply that the passage cited indicates simply that human principates did not originate with nature, but does not indicate that they are contrary to nature. To be sure, Augustine here gives expression to the opinion that the dominion of one man over another is derived from the occasion created by sin, rather than from the primary design of nature; but he is speaking of that form of dominion whose concomitants are slavery and a condition of servitude. And Gregory the Great[1] expresses himself more clearly with regard to the governing power; but he should be interpreted as referring to coercive power and the exercise thereof; since, in so far as directive power is concerned, it would seem probable that this existed among
201 men even in the state of innocence. For a hierarchy and a principate exist among the angels, too, as is evident from the language of the Scriptures, from the words of Dionysius [the Areopagite] (*Concerning Ecclesiastical Hierarchy*, Chap. ix), and from those of Gregory (*Homilies*, XXXIV, *In Evangelia*). Moreover, our own preceding arguments may be considered as applicable to the state of innocence, since they are based, not upon sin nor upon any defection from order, but upon the natural disposition of man, the disposition to be a social animal and to demand by nature a mode of living in which he dwells in a community, the latter necessarily requiring to be ruled by means of public power. Coercion, on the other hand, presupposes the existence of a certain amount of defection from order, and therefore, with reference to coercion, it may be said that this power was introduced in consequence of sin. Similarly, a wife's subjection to her husband is also natural, and such subjection would exist in the state of innocence; yet it was after the commission of sin that these words were spoken to Eve: 'Thou shalt be under thy husband's power' (*Genesis*, Chap. iii [, v. 16]), the reference being to a proportionate coercive force, as Augustine has indicated (*De Genesi ad Litteram*, Bk. XI, chap. xxxvii).

Dionysius. Gregory. St. Augustine.

13. Turning to the third confirmation [*supra*, Section 1, at end], based upon certain Scriptural passages, we reply that, in these passages, that is attributed to God which is His, but that is not denied to men which may be shared by them. Accordingly, Isaias[2] [*Isaias*, Chap. xxxiii, v. 22] exhorts his people to trust in God and in His protection, because he holds that God is the true lord, king and lawgiver, that is to say, lord, king and lawgiver in a superlative and unique sense; but, [in making such an exhortation,] he does not exclude that people's right to have its own human king, a king who in his own proper degree might

Isaias.

[1] [Gregory the Great (*Moralium Libri* and *Liber Regulæ Pastoralis*) was also cited in connexion with the second confirmation. *Vide* Section 1 of this Chapter.—Tr.]

[2] [*Isaias* and *Saint James* are quoted in Section 1 of this Chapter, in the course of the third confirmation of the doubt.—Tr.]

James.

also have been lord, &c. Again, it is possible to give a similar interpretation to the passage in *James* [Chap. iv, v. 12], concerning the supreme lawgiver and judge, as is indicated by the words, '[There is one lawgiver, and judge,] that is able to destroy and to deliver'. For these attributes would seem to be proper to God. A satisfactory exposition of this passage may, indeed, be supplied by interpreting the word 'one' as denoting identity rather than singularity, so that the sense would be: he who is lawgiver is also judge; nor should the function of judgment be usurped by one who is not the lawgiver and has not the lawgiver's power. Thus it is that Saint James adds [*ibid.* v. 13]: 'But who art thou that judgest thy brother?'[1] He does not deny, then, that men can be legislators and can pass judgment, but he does reprove those who judge rashly and thus usurp the office of judges and legislators.

To the fourth confirmation [*supra*, this Chapter, Section 1], we shall reply later, in treating of the obligation imposed by human law.

CHAPTER II

IN WHAT MEN DOES THIS POWER TO MAKE HUMAN LAWS RESIDE DIRECTLY, BY THE VERY NATURE OF THINGS?

1. The reason for doubt on this point is the fact that the power in question dwells either in individual men; or in all men, that is to say, in the whole body of mankind collectively regarded.

Reasons for doubt.

The first alternative cannot be upheld. For it is not true that every individual man is the superior of the rest;[2] nor do certain persons, [simply] by the nature of things, possess the said power in a greater degree than other persons [, on some ground apart from general superiority], since there is no reason for thus favouring some persons as compared with others.

The second alternative would also seem[3] to be untenable. For in the first place, if it were correct, all the laws derived from such power would be common to all men. And secondly, [so the argument runs] no source can be found, from which the whole multitude of mankind could have derived this power; since men themselves cannot be that source—inasmuch as they are unable to give that which they do not possess—and since the power cannot be derived from God, because if it

[1] [The Vulgate has 'neighbour'.—Tr.]

[2] [This would seem, in the light of the context, to be the most acceptable interpretation of Suárez's argument at this point, although the Latin text is ambiguous: *quia neque omnes sunt aliorum superiores.*—Tr.]

[3] [Suárez is apparently presenting here the arguments opposed to the very alternative which he nevertheless accepts. (*Vide* the first sentence of Section 3 of this Chapter.) Thus the word *videtur* (would . . . seem) should not be overlooked by the reader.—Tr.]

were so derived, it could not change but would necessarily remain in the whole community in a process of perpetual succession, like the spiritual power which God conferred upon Peter and which for that reason necessarily endures in him or in his successors, and cannot be altered by men.

2. It is customary to refer, in connexion with this question, to the opinion of certain canonists who assert that by the very nature of the case this [legislative] power resides in some supreme prince upon whom it has been divinely conferred, and that it must always, through a process of succession, continue to reside in a specific individual. The Gloss (on *Decretum*, Pt. II, causa VII, qu. i, can. ix) is cited [by way of confirmation]; but the passage cited contains simply the statement that the son of a king is lawfully king, which is a very different matter, nor does it assert that this mode of succession was perpetual among men. Another Gloss (on *Decretum*, Pt. I, dist. x, can. viii) is also cited, because it declares that the Emperor receives his power from God alone. But that Gloss, in its use of the exclusive word 'alone', is intended to indicate simply that the Emperor does not receive his power from the Pope; it is not intended to deny that he receives it from men. For, in this very passage, it is said that the Emperor is set up by the army in accordance with the ancient custom mentioned in the *Decretum* (Pt. I, dist. XCIII, can. XXIV). The said opinion, then, is supported neither by authority nor by a [rational] basis, as will become more evident from what follows.

The first opinion.

Gloss.

3. Therefore, we must say that this power, viewed solely according to the nature of things, resides not in any individual man but rather in the whole body of mankind. This conclusion is commonly accepted and certainly true. It is to be deduced from the words of St. Thomas ([I.-II,] qu. 90, art. 3, ad 2 and qu. 97, art. 3, ad 3) in so far as he holds that the prince has the power to make laws, and that this power was transferred to him by the community. The civil laws (*Digest*, I. iv. 1 and I. ii. 2, § 11) set forth and accept the same conclusion. And it is upheld at length by Castro (*De Potestate Legis Poenalis*, Bk. I, chap. i, § *Postquam*), as well as by Soto (*De Iustitia et Iure*, Bk. I, qu. i, art. 3). One may also consult Soto (*ibid.*, Bk. IV, qu. ii, arts. 1 and 2), Ledesma ([*Theologiae Moralis*,] II, Pt. IV, qu. xviii, art. 3, doubt 10), Covarruvias (*Practicae Quaestiones*, Chap. i, [no. 2,] first concl.), and Navarrus (on *Decretals*, Bk. II, tit. 1, chap. xiii, notab. 3, no. 119).

The opinion of the author.

St. Thomas. Castro. Soto. Ledesma. Covarruvias. Navarrus.

The basic reason in support of the first part of the conclusion is evident, and was touched upon at the beginning of our discussion, namely, the fact that in the nature of things all men are born free; so that, consequently, no person has political jurisdiction over another person, even as no person has dominion over another; nor is there any

reason why such power should, [simply] in the nature of things, be attributed to certain persons over certain other persons, rather than *vice versa*. One might make this assertion only: that at the beginning of creation Adam possessed, in the very nature of things, a primacy and consequently a sovereignty over all men, so that [the power in question] might have been derived from him, whether through the natural origin of primogeniture, or in accordance with the will of Adam himself. For it is so that Chrysostom (on *First Corinthians*, Homily XXXIV [, no. 5]) has declared all men to be formed and procreated from Adam alone, a subordination to one sole prince being thus indicated. However, by virtue of his creation only and his natural origin, one may infer simply that Adam possessed domestic—not political—power. For he had power over his wife, and later he possessed the *patria potestas* over his children until they were emancipated. In the course of time, he may also have had servants and a complete household with full power over the same, the power called 'domestic'. But after families began to multiply, and the individual heads of individual families began to separate, those heads possessed the same power over their respective households. Political power, however, did not make its appearance until many families began to congregate into one perfect community. Accordingly, since this community had its beginning, not in the creation of Adam nor solely by his will, but rather by the will of all who were assembled therein, we are unable to make any well-founded statement to the effect that Adam, in the [very] nature of things, held a political primacy in the said community. For such an inference cannot be drawn from natural principles, since it is not the progenitor's due, by the sole force of natural law, that he shall also be king over his posterity.

Chrysostom.

The power held by Adam over[1] his descendants.

But, granted that this inference does not follow upon natural principles, neither have we sufficient foundation for the assertion that God has bestowed such power upon that [progenitor], through a special donation or act of providence, since we have had no revelation to this effect, nor does Holy Scripture so testify to us. To this argument may be added the point made by Augustine and noted in our preceding Chapter [Chap. i, sect. 1], namely, that God did not say: 'Let us make man that he may have dominion over men', but rather did He say: [Let us make man that he may have dominion] over other living creatures.[2]

Therefore, the power of political dominion or rule over men has not been granted, directly by God, to any particular human individual.

[1] [The marginal subheading, *Quam potestatem habuit Adamus posteros*, should read: *Quam potestatem habuit Adamus in posteros*, the reading found in the editions of Mayence, 1619 and Paris, 1856.—Tr.]

[2] [Suárez merely paraphrases Augustine's statement in these two passages.—Tr.]

4. From the foregoing, it is easy to deduce the second part of the assertion [at beginning of Section 3], namely, that the power in question resides, by the sole force of natural law, in the whole body of mankind [collectively regarded].

Two standpoints from which the whole multitude of mankind may be regarded.

The proof is as follows: this power does exist in men, and it does not exist in each individual, nor in any specific individual, as has also been shown; therefore, it exists in mankind viewed collectively, for our foregoing division [into the two alternatives] sufficiently covers the case.

However, in order that our argument may be better understood, it must be noted that the multitude of mankind is regarded in two different ways.

First, it may be regarded simply as a kind of aggregation, without any order, or any physical or moral union. So viewed, [men] do not constitute a unified whole, whether physical or moral, so that they are not strictly speaking one political body, and therefore do not need one prince, or head. Consequently, if one regards them from this standpoint, one does not as yet conceive of the power in question as existing properly and formally; on the contrary, it is understood to dwell in them at most as a fundamental potentiality,[1] so to speak.

The multitude of mankind should, then, be viewed from another standpoint, that is, with regard to the special volition, or common consent, by which they are gathered together into one political body through one bond of fellowship and for the purpose of aiding one another in the attainment of a single political end. Thus viewed, they form a single mystical body which, morally speaking, may be termed essentially a unity; and that body accordingly needs a single head. Therefore, in a community of this kind, viewed as such, there exists in the very nature of things the power of which we are speaking, so that men may not, when forming such a group, set up obstacles to that power; and consequently, if we conceive of men as desiring both alternatives—that is to say, as desirous of so congregating, but on the condition (as it were) that they shall not be subject to the said power—the situation would be self-contradictory, and such men would accordingly fail to achieve any [valid end]. For it is impossible to conceive of a unified political body without political government or disposition thereto; since, in the first place, this unity arises, in a large measure, from subjection to one and the same rule and to some common superior power; while furthermore, if there were no such government, this body could not be directed towards one [common] end and the general welfare. It is, then, repugnant to natural reason to assume the existence of a group of human beings united in the form of a single political body,

203

[1] [The Latin has simply *radicaliter*.—Tr.]

without postulating the existence of some common power which the individual members of the community are bound to obey; and therefore, if this power does not reside in any specific individual, it must necessarily exist in the community as a whole.

5. To what has been said above, we should add the statement that the power in question does not reside in the multitude of mankind by the very nature of things in such wise that it is necessarily one sole power with respect to the entire species, or entire aggregate, of men existing throughout the whole world; inasmuch as it is not necessary to the preservation or welfare of nature, that all men should thus congregate in a single political community. On the contrary, that would

Aristotle.

hardly be possible, and much less would it be expedient. For Aristotle (*Politics*, Bk. VII, chap. iv [, § 7]) has rightly said that it is difficult to govern aright a city whose inhabitants are too numerous; accordingly, this difficulty would be still greater in the case of a kingdom excessively large, and therefore, it would be greater by far (we are referring to civil government) if the whole world were concerned.

Consequently, it seems to me probable that the power of which we speak never existed in this fashion in the whole assemblage of mankind, or that it so existed for an exceedingly brief period; and that, on the contrary, soon after the creation of the world, mankind began to be divided into various states in each one of which this power existed

Augustine.

in a distinct form. Thus it is that Augustine (*On the City of God*, Bk. XV, chap. viii) concludes from the Fourth Chapter of *Genesis*, that

Genesis.

Cain, before the Flood, was the first to establish an individual kingdom and commonwealth. Moreover, in another passage of the same work

Augustine.

(Bk. XVI, chap. iv), Augustine adds that, according to the Tenth Chapter of *Genesis*, after the Flood, Nemrod was [the first to do so]. For Cain first brought about a division of the perfect community, separating himself from his father's family; and Nemrod did likewise, at a later period, with respect to Noe.

6. Finally, it may be concluded from the foregoing that this power to make human laws of an individual and special nature, laws which we call civil, as if to indicate that they are ordained for one perfect community—it may be concluded, I say—that this power never existed in one and the same form throughout the whole world of men, being rather divided among various communities, according to the establishment and division of these communities themselves. Thus we also conclude that—before the coming of Christ, at least—this civil power did not reside in any one specific man with respect to the whole world. For at no time did all men agree to confer that power upon a particular ruler of the entire world, neither have we any knowledge of its bestowal upon some particular individual by God; inasmuch as such an idea might most easily be entertained with regard to Adam, and we

have already shown it to be inapplicable to him [*supra*, Section 3 of this Chapter]. Finally, as is evident in the light of history, no one has ever acquired such power through war or any other similar means.

As to what should be said, however, with respect to the situation after the advent of Christ, that is a matter which I shall take up in the following Book.[1]

But these statements are not incompatible with what we have already said regarding the *ius gentium*. On the contrary, they serve to confirm those earlier assertions. For even though the whole of mankind may not have been gathered into a single political body, but may rather have been divided into various communities, nevertheless, in order that these communities might be able to aid one another and to remain in a state of mutual justice and peace (which is essential to the universal welfare), it was fitting that they should observe certain common laws,

The manner in which the precepts of the *ius gentium* were introduced.

as if in accordance with a common pact and mutual agreement. These are the laws called *iura gentium*; and they were introduced by tradition and custom, as we have remarked, rather than by any written constitution. Moreover, they comprise that twofold body of law—special and common[2]—which Gaius distinguished in the *Digest* (I. i. 9).

CHAPTER III

HAS THE POWER OF MAKING HUMAN LAWS BEEN GIVEN TO MEN IMMEDIATELY BY GOD AS THE AUTHOR OF NATURE?

1. A reason for doubt on this question may lie in the fact that it

A reason for doubt.

apparently follows upon what has been said above that this power over an entire community of men assembled together is derived from them as individuals, and through their own consent. For such power springs from the same source as does the very community in which it resides; and that community is welded together by means of the consent and volition of its individual members; therefore, the power in question also flows from those same wills.

204 The major premiss is manifestly true, because, once the community is assumed to exist, it follows that this power likewise exists; for he who gives the form, gives, too, those things which are consequent upon the form; and therefore, whoever is the proximate author of the said community, would seem also to be the author and bestower of its power. But, on the other hand, it may be contended that before men congregate into one political body this power does not reside in the individuals, whether wholly or in part, and that, furthermore, it

[1] [Not included in these *Selections*.—Tr.]
[2] [That is to say, the law of each state and the law common to all men.—Tr.]

does not exist even in the rough mass (so to speak), or aggregate, of mankind, a point which was made in the preceding Chapter; and therefore, the power can never flow immediately from men.

The common and true opinion.

2. On this question, the common opinion appears to be that the said power is given immediately by God, as the Author of nature, in such a way that men in a sense dispose the matter involved and render the recipient capable of wielding the power, yet the form is imparted, as it were, by God, Who is the Giver of the power. Such is the view suggested by Cajetan (*Opuscula*, Vol. I, tract. ii: *De Potestate Papae*, Pt. II, chap. x, reply to 2d confirmation [chap. ix, *ad id vero*]), by Covarruvias (*Practicae Quaestiones*, Chap. i [, no. 6]), by Victoria, more at length, in the *Relectio* that treats of this power [*De Potestate Civili*], and by Soto (*De Iustitia et Iure*, Bk. IV, qu. ii, art. 1).

Cajetan. Covarruvias. Victoria. Soto.

Moreover, one might adduce as an argument the fact that, as I remarked above,[1] if we assume that men have willed to gather together into one political community, it is not in their power to set up obstacles to this jurisdiction; and this is an indication that the jurisdiction does not flow proximately from their wills as from a true efficient cause. Thus, in regard to matrimony, we rightly infer that the husband is the head of the wife by grant of the Author of nature Himself, and not by the will of the wife; for though they may contract the marriage by their own will, nevertheless, if they do contract it, they cannot prevent the establishment of this superiority.

To the Romans, xiii.

This view is confirmed by Saint Paul, who says (*To the Romans*, Chap. iii [Chap. xiii, vv. 1, 2]): '[. . .] there is no power but from God [. . .] and therefore he that resisteth the power, resisteth the ordinance of God'; therefore, the power in question is also of God; and consequently, it is derived immediately from Him, since it has no other prior, or more immediate, source.

The acts of legislative power.

3. Secondly, it is held that this power embraces several acts which appear to transcend human authority as it exists in individual men; and this is an indication that such power is not from them, but from God. The first of these acts is the punishment of malefactors, extending even to the death penalty. For, since God alone is the Lord of life, it would seem that He alone could have granted the power [to impose this penalty]. Thus it is that Augustine has said (*De Natura Boni, Contra Manichaeos*, Chap. xxxii): 'There is no power to hurt unless it comes from God.' The second act is the establishment, in a certain matter, of the mean of virtue necessary to its rectitude.[2] Thirdly, to this [righteous] state has been added the

Augustine.

[1] [*Supra*, p. 364, § 3, chapter i, of this Book.—Tr.]

[2] [For example, the legislator may order certain acts to be performed as acts of the virtues of temperance, justice, and so on.—Revisers.]

effect of binding the conscience, as we shall see below, and this effect would seem to pertain most especially to divine power. The fourth act is the infliction of punishment for injuries done to individuals; for it has moreover been written (*Romans*, Chap. xii [, v. 19]): '*Revenge* is mine; I will repay, saith the Lord.'[1] This, then, is an indication that the power in question is divine; for otherwise, men would have been able to seize for themselves some other means for the avenging of injuries, and that would be opposed to natural justice.

Romans, xii.

4. One part of this opinion[2] is clear and beyond dispute; but another requires explanation.

The first part is the contention that the power under discussion comes from God as its primary and principal Author. For this appears to correspond with the clearly expressed opinion of Paul and to be sufficiently well proved by the arguments already set forth. Moreover, since this power is a part of the nature of things, and since—whether it be physical or moral—it is in an absolute sense a good thing, extremely valuable and necessary for the good estate of human nature, it therefore must flow from the Author of that nature. Finally, since the persons who wield this power within a human community are the ministers of God, they accordingly administer a power received from God; and therefore, God is not only the chief Author of this power but its exclusive Author.

The other part of this opinion, however, calls for an explanation, as to how God may be said to confer the power in question immediately.

In what way the afore-mentioned power is given by God.

5. With respect to this point, I shall say briefly that, in the first place, this power is given by God as a characteristic property resulting from nature, just as the bestowal of the form involves the bestowal of that which is consequent upon the form.

The first proof of this assertion is the fact that God does not give this power by a special act or grant distinct from creation; for if He did so, that grant would necessarily be made manifest through revelation, and this is clearly not the case, since if it were, such power would not be natural. Therefore, the power is given as a characteristic property resulting from nature, that is to say, resulting through a dictate of natural reason, since the latter shows that God has sufficiently provided for mankind, and has therefore given it the power necessary to its
205 preservation and proper government.

When the afore-mentioned power manifests itself.

6. In the second place, I declare that this power does not manifest itself in human nature until men gather together into one perfect community and are politically united. My assertion is proved as follows: the said power

[1] [The words *dicit Dominus* (saith the Lord) are not a part of the quotation in the Latin text.—Tr.]

[2] [i.e. the opinion in Sect. 2, *supra*, p. 378.—Tr.]

resides not in individual men separately considered, nor in the mass or multitude of them collected, as it were, confusedly, in a disorderly manner, and without union of the members into one body; therefore, such a political body must be constituted, before power of this sort is to be found in men, since—in the order of nature,[1] at least—the agent of the power must exist prior to the existence of the power itself. Once this body has been constituted, however, the power in question exists in it, without delay and by the force of natural reason; and consequently, it is correctly supposed that it exists as a characteristic property resulting from such a mystical body, already constituted with just the mode of being [that it has] and not otherwise. Wherefore, even as man—by virtue of the very fact that he is created[2] and has the use of reason—possesses power over himself and over his faculties and members for their use, and is for that reason naturally free (that is to say, he is not the slave but the master of his own actions), just so the political body of mankind, by virtue of the very fact that it is created in its own fashion, possesses power over itself and the faculty of self-government, in consequence whereof it also possesses power and a peculiar dominion over its own members. Moreover, by a similar process of reasoning, just as freedom [of will] has been given to every man by the Author of nature, yet not without the intervention of a proximate cause—that is to say, the parent by whom [each man] is procreated—even so the power of which we are treating, is given to the community of mankind by the Author of nature, but not without the intervention of will and consent on the part of the human beings who have assembled into this perfect community.

Nevertheless, just as, in the former case, the will of the parent with respect to generation only is necessary, but no act of will endowing the child with freedom, or with the other natural faculties which are not essentially dependent upon a special act of will on the part of the parent, being on the contrary a natural consequence; even so, with respect to the matter under discussion, human will is necessary in order that men may unite in a single perfect community, but no special act of volition on their part is required to the end that this community shall possess the said power, which arises rather from the very nature of things, and from the providence of the Author of nature, so that in this sense it is rightly said to have been conferred immediately by Him.

7. I shall add that, thirdly, although this power is (so to speak) a natural attribute of a perfect human community, viewed as such, nevertheless, it does not reside immutably therein, but may be taken from that com-

The afore-mentioned power is not immutable.

[1] [The order of nature, that is, the order of reality, as distinguished from the order of thought.—Revised.]
[2] [Reading *creatur*, with the Paris edition of 1856; not *creditur*, the reading of our own Latin text.—Tr.]

munity—by its own consent or through some other just means—and transferred to another [seat of authority].

This fact is sufficiently evidenced by usage, and it will, moreover, be explained more fully by the inferences to be drawn below. First, its truth may be demonstrated by means of the example already adduced, that is to say, by applying this example in due proportion. For freedom from servitude is a natural property of man, and is therefore wont to be described as an effect of natural law; yet man can by his own volition deprive himself of this property, or can even for a just cause be deprived thereof and reduced to slavery; and therefore, in like manner, a perfect human community, though by nature it may be free and may possess within itself the power to which we refer, nevertheless can be deprived of that power in one or another of the ways already mentioned. Thus it may be considered that, even though the physical properties emanating from nature are wont to be immutable from the standpoint of nature, nevertheless, these quasi-moral properties—which are like titles of ownership, or rights—can be changed by means of a contrary will, in spite of their derivation from nature; just as [, to be sure,] even those physical properties which have the contrary quality, or are derived from some contrary disposition, are sometimes liable to change, as is evident.

8. A second proof of the same contention is based upon a certain similarity and, from another point of view, upon a dissimilarity, between the power in question, and that which is derived from a special divine disposition—such a power, for example, as that of the Pope.

For though this power has been bestowed by Christ upon a specific individual duly chosen, it may be renounced by the Pope himself, who may deprive himself thereof, if he so wishes; at least, he may do so if the Church accepts the resignation, as I here assume. In this respect, then, there exists a certain similarity, since the human community, too, though it has received this power from God, may, if it wishes, deprive itself thereof.

A dissimilarity exists, however, as to mode. For in the first place, the Pope, once he has been elected, cannot for any cause whatsoever be deprived of his power or dignity, by the whole body of mankind, if he himself is unwilling. By Christ alone, Who gave that power, can he be so deprived. The commonwealth, on the other hand, can on some occasions, and for just cause, be divested of its liberty through some coercive measure, such as a just war. Again, a dissimilarity exists because the papal power cannot be so changed as to be transferred by one person to a community, since it is not within the power of man to alter the monarchical government of the Church; whereas
206 the human community, on the other hand, may transfer its own

jurisdiction to a single individual or to some other community, as will be made clear. Thus the power under discussion is not only mutable, but even more mutable [than that derived from a divine disposition], and more dependent upon human will.

In the third place, a reason for this difference may be found in the fact that those things which are the result of a special disposition are dependent upon the will of him who orders the disposition, a will which cannot be changed by his inferiors; whereas the power in question results, not from such a disposition, but from nature, and is therefore bestowed in such form as befits the rational nature and accords with right reason and prudence. And natural reason declares that it is not necessary to rational nature—nor even conformable to it—that the said power should reside in an immutable form within the community as a whole, since the latter, so viewed, and without the addition of any specific qualification or the making of any change, would scarcely be able to put this power to use; and therefore, the power is so given by nature and by the Author of nature, as to be capable of undergoing such change as may be expedient for the common good.

CHAPTER IV

COROLLARIES FROM THE DOCTRINE SET FORTH ABOVE

1. From our discussion in the preceding Chapter, we may draw certain inferences which will throw a great deal of light on all that we have to say.

The first inference is this: although the power in question is in an absolute sense an effect of the natural law, its specific application as a certain form of power and government is dependent upon human choice. This inference may be explained as follows: political government, according to the doctrine set forth by Plato in the Dialogue on *The Statesman*, or *On Kingship*[1] [Chap. xxxi = p. 291 D], and in the *Republic* [Bk. I, chap. xii; Bk. IV, *passim*, especially at end = p. 445 D E], as well as by Aristotle in the *Politics* (Bk. III, chap. v), and in the *Ethics* (Bk. VIII, chap. x), takes three simple forms. These forms are: monarchy, or government by one head; aristocracy, or government by the few and the best; and democracy, or government by the many and the common people. From these, it is possible to make up various mixed forms of government, that is to say, forms compounded of these simple ones by drawing either from all three or from two of them. Bellarmine (*De Potestate Summi Pontificis*, Bk. I, from the beginning and through several Chapters) may be consulted, for he has treated

Plato.

Aristotle.

Bellarmine.

[1] [This is the usual English translation of the Greek title for this Dialogue, referred to in our Latin text as *Dialogo Civili, seu de Regno*.—TR.]

of the matter at length and very satisfactorily. Thus men are not obliged, [simply] from the standpoint of natural law, to choose any given one of these forms of government.

We grant, indeed, that monarchy is the best among the three; as Aristotle demonstrates very fully and as one may infer from the government and providential plan of the universe in its entirety, the government and plan which ought to be the most excellent, so that Aristotle concludes (*Metaphysics*, Bk. XII, at end [= p. 1076 A]): 'Therefore, let there be one prince.' This conclusion is also supported by the example of Christ the Lord in the institution and government of His Church. And, finally, the prevailing usage among all nations is an argument in favour of the same view. Although—as I was saying—we grant this to be true, nevertheless, other forms of government are not [necessarily] evil, but may, on the contrary, be good and useful; so that, consequently, men are not compelled by the sheer force of the natural law to place this power either in one individual, or in several, or in the entire number of mankind; and therefore, this determination [as to the seat of the power] must of necessity be made by human choice.

Monarchy is the best form of government.

Aristotle.

Moreover, experience similarly reveals a great deal of variety in connexion with this [most excellent type of government]. For monarchies may be found in this place or in that, and rarely in their simple form; since—given the frailty, ignorance and wickedness of mankind—it is as a rule expedient to add some element of common government which is executed by a number of persons, this common element being greater or smaller according to the varying customs and judgment of men. Accordingly, this whole matter turns upon human counsel and human choice.

We infer, then, that by the nature of things, men as individuals possess to a partial extent (so to speak) the faculty for establishing, or creating, a perfect community; and, by virtue of the very fact that they establish it, the power in question does come to exist in this community as a whole. Nevertheless, natural law does not require either that the power should be exercised directly by the agency of the whole community, or that it should always continue to reside therein. On the contrary, it would be most difficult, from a practical point of view, to satisfy such requirements, for infinite confusion and trouble would result if laws were established by the vote of every person; and therefore, men straightway determine the said power by vesting it in one of the above-mentioned forms of government, since no other form can be conceived, as is easily evident to one who gives the matter consideration.

2. The second inference [to be drawn from the preceding Chapter] is as follows: civil power, whenever it resides—in the right

and ordinary course of law—in the person of one individual, or prince, has flowed from the people as a community, either directly or indirectly; nor could it otherwise be justly held.

When the civil power flows from the community.

This is the common opinion of the jurists, as indicated by their comments on certain laws of the *Digest* (I. iv. 1 and I. ii. 2). Moreover, the same conclusion is upheld in these laws themselves; by Panormitanus and other canonists (on *Decretals*, Bk. IV, tit. XVII, chap. xiii); by St. Thomas (I.–II, qu. 90, art. 3 and qu. 97 [, art. 3]); by Cajetan (in the above-cited work, *De Potestate Papae*, Pt. II, chaps. ii and x [chap. ix]); by Victoria (in his *Relectio* on this very subject [*De Potestate Civili*]); and by other authorities to whom reference has been made.

Panormitanus. St. Thomas. Cajetan. Victoria.

A reason for this view, supplied by what we have said above, is the fact that such power, in the nature of things, resides immediately in the community; and therefore, in order that it may justly come to reside in a given individual, as in a sovereign prince, it must necessarily be bestowed upon him by the consent of the community.

[This] power, in the very nature of things, is lodged immediately in the community.

Again, the same view may be explained by means of a comprehensive enumeration of the various aspects of the matter.[1]

For [in the first place,] the power in question may be considered as having been bestowed upon kings immediately by God Himself. Yet such a bestowal, although it has sometimes occurred—as it did in the case of Saul and in that of David—has nevertheless been extraordinary and supernatural in so far as concerned the mode [of imparting power]. In the common and ordinary course of providence, however, such cases do not come to pass, since—in the natural order—men are governed in civil affairs not by revelations, but by natural reason. Neither may a valid objection be based upon the assertions in certain Scriptural passages, as in the Fourth Chapter of *Daniel*, that God gives kingdoms and changes them at His will; or as in the Forty-fifth Chapter of *Isaias*, which declares that God made Cyrus a king; wherefore Christ said [to Pilate] (*John*, Chap. xix [, v. 11]): 'Thou shouldst not have any power against me, unless it were given thee from above.' For the meaning of these passages is simply that all of the events mentioned come to pass only through the special providence of God, Who either ordains or permits them, as Augustine has said (*On the Gospel of John*, Tract. VI [, chap. i, § 25] and *Against Faustus*, Bk. XXII, chap. lxxiv); but this fact does not prevent such [bestowals and transferences of power] from being executed by human agency; just as all

The first title of royal power is derived immediately from God.

Daniel, iv. *Isaias*, xlv. *John*, x.x. Augustine.

[1] [i.e., the various titles to monarchical power. This enumeration extends throughout the remainder of Section 2, and through the whole of Sections 3 and 4.—TR.]

the other effects wrought through secondary causes are attributed primarily to the providence of God.

3. A second possibility is that this power may reside in a king through hereditary succession. Some jurists, indeed, are of the opinion that such was the case from the very beginning; but others rightly point out that succession necessarily presupposes the existence of dominion or power in the person succeeded, so that we must of necessity trace it to some one who was not the successor of another, since the succession cannot reach back *ad infinitum*. Therefore, with respect to that first[1] possessor, we ask whence he has derived the kingdom and power, since he does not possess it inherently and by natural law. Title by succession, then, cannot be the primary source of this power as it resides in the sovereign. Therefore, the first possessor must have derived the supreme power directly from the commonwealth, while his successors must derive it from that same source indirectly, [yet] fundamentally. Moreover, since any possession passes into the hands of a successor with its accompanying obligations, the conditions attaching to the kingly power when it was transmitted by the commonwealth to the first king, pass to his successors, so that they possess that power together with the original obligations.

A second title of royal power: hereditary succession.

4. A third title of royal power is wont to arise on the basis of war, which must be just war in order to confer a valid title and dominion. Consequently, many persons believe that kingdoms were originally introduced through tyranny rather than true power. This belief is attested by Alvaro Paez (*De Planctu Ecclesiae*, Bk. I, chap. xli), by Driedo (*De Libertate Christiana*, Bk. I, chap. xv), and by Petrus Bertrandi (in his treatise *De Origine et Usu Iurisdictionis*, Qu. 1). Accordingly, when the kingly power is held solely through unjust force, there is no true legislative power vested in the king; yet it is possible that, in the course of time, the people may give their consent to and acquiesce in such sovereignty, in which case the power in question is [once more] traced back to an act of transmission and donation on the part of the people, It may sometimes happen, however, that a state not previously subject to a king is subjected through a just war. But such an event is always an incidental circumstance (as it were) of the punishment of some wrongdoing; so that the state in question is bound to obedience and to acquiescence in such subjection; and therefore, this mode [of acquiring kingly power] also includes, in a sense, the consent—whether expressed or [implicitly] due—of the state.

A third title of royal power: a just war.

Alvaro Paez. Driedo. Petrus Bertrandi.

However, we are now treating of this power chiefly in so far as it

[1] [Reading *primo* (the unaccented adjective) in accordance with the 1619 and 1856 editions, instead of *primò* (the accented adverb).—TR.]

is inherently capable of being introduced and bestowed upon one man. And finally, if we give the matter sufficient consideration, we shall find that when such subjection to one king is imposed by means of a just war, it is presupposed that he possesses the royal power by virtue of which he is able to declare that war; and this power is simply a just extension (so to speak) of the power of his kingdom; so that such kingly power is always to be traced back to some individual who attained it, not through war, but through just election or the consent of the people.

We rightly conclude, then, after this comprehensive enumeration [of the various titles to royal power], that the said power has been derived [in every case] by the prince from the state.

5. It may, indeed, be objected that from our conclusion it follows that this royal power pertains exclusively to human law, a deduction which would seem to be contrary to the language of the Scriptures: 'By me, kings reign [. . .]' (*Proverbs*, Chap. viii[, v. 15]); and again, 'For he is God's minister,' &c. (*Romans*, Chap. xiii [, v. 4]).

Proverbs, viii.

Romans, xiii.

The royal power viewed formally as such pertains to human law.

Another deduction from the same conclusion is that the kingdom must be superior to the king, since it has given the king his power; whence a further inference is drawn, namely, that the kingdom may, if it shall so choose, depose or change its king, a deduction which is altogether false.

Consequently, Victoria (above cited [*De Potestate Civili*]) held that the royal power should be described absolutely as derived from divine law and as having been given by God, with the intervention of human choice. On the other hand, Bertrandi, Driedo (above cited) and Castro (*De Potestate Legis Poenalis* [Bk. I, chap. i]) uphold the opposite doctrine, which is doubtless the true doctrine, if one is speaking in a formal sense of the royal power as such and in so far as it exists in one man. For this governing power, regarded from a political viewpoint and in its essence, is undoubtedly derived from God, as I have said; yet the fact that it resides in a particular individual results—as has been demonstrated—from a grant on the part of the state itself; and therefore, in this sense, the said power pertains to human law. Moreover, the monarchical nature of the government of such a state or province is brought about by human disposition, as has already been shown; therefore, the principate itself is derived from men. Another proof of this derivation is the fact that the power of the king is greater or less, according to the pact or agreement between him and the kingdom; therefore, absolutely speaking, **that power is drawn from men.**

Bertrandi. Driedo. Castro.

208

6. The passages cited from Holy Scripture, however, are to be interpreted as having two meanings. One is as follows: the power in question, viewed in itself, is derived from God; and it is just and in conformity with the divine will. The other meaning is this: assuming

that the said power has been transferred to the king, he is now the vicar of God, and natural law makes it obligatory that he be obeyed. The case is similar to that of a private individual who surrenders himself by sale to be the slave of another; so that the resulting power of *dominium* has, in an absolute sense, a human derivation, yet the slave is [also] bound by divine and natural law—once we assume that the contract has been made—to render obedience to his master.

Thus the reply to the confirmation [of the opposing view] consists clearly in a general denial of the [second] deduction [and its corollary].[1] For, once the power has been transferred to the king, he is through that power rendered superior even to the kingdom which bestowed it; since by this bestowal the kingdom has subjected itself and has deprived itself of its former liberty, just as is, in due proportion, clearly true in the case of the slave, which we have mentioned by way of illustration. Moreover, in accordance with the same reasoning, the king cannot be deprived of this power, since he has acquired a true ownership of it; unless perchance he lapses into tyranny, on which ground the kingdom may wage a just war against him, a point which we consider elsewhere.[2]

7. A third inference to be drawn from our preceding Chapter[3] is as follows: in view of the nature of things—that is to say, according to the natural and ordinary course of human events—there are no civil laws established universally for the whole world and binding upon all men.

There are no laws established universally for the whole world, which are binding upon all.

This fact is evident, indeed, from the term itself, since we are speaking of human laws as strictly distinguished from the *ius gentium*, and therefore called civil, for the reason that they are peculiar to one city state or one nation, as the *Digest* (I. i. 9) declares. We are furthermore speaking of laws which can be established by natural power, omitting for the present the consideration of supernatural power. Accordingly, such laws demand, as by an intrinsic condition, that they should not be of a universal nature.

The reason [in support of our third inference] is the fact that *a priori* there is in existence no legislative power with jurisdiction over the whole world, that is, over all mankind; and therefore, no civil law can be thus universal. The consequent is clearly true, since no law extends its force beyond the limits of the legislator's jurisdiction. 'For we know', says Paulus [*Digest*, II. i. 20], 'that every law is addressed to those who are under the jurisdiction of that law'; since 'he who

[1] [i.e. the deduction 'that the kingdom must be superior to the king', and the consequent inference 'that the kingdom may, if it shall so choose, depose or change its kings'. *Vide* the second paragraph of Section 5 of this Chapter, p. 386. TR.]

[2] *Defensio Fidei Catholicae*, Bk. VI, chap. iv, *infra*, p. 705, and in Disp. XIII of *De Bello*, Sec. viii, *infra*, pp. 854–5.—TR.]

[3] [*Vide* the first sentence of this Chapter, *supra*, p. 382.—TR.]

pronounces judgment outside the territory [of his jurisdiction] may be disobeyed with impunity,' as the laws declare; and therefore, much less are we bound to obey, outside his own territory, the person who decrees law, or legal precepts [for that territory]. The antecedent, moreover, is manifestly true in the light of what has already been said. For the power in question does not reside in the whole community of mankind, since the whole of mankind does not constitute one single commonwealth or kingdom. Nor does that power reside in any one individual, since such an individual would have to receive it from the hands of men, and this is inconceivable, inasmuch as men have never agreed to confer it [thus], nor to establish one sole head over themselves. Furthermore, not even by title of war, whether justly or unjustly, has there at any time been a prince who made himself temporal sovereign over the whole world. This assertion is clearly borne out by history. And therefore, the ordinary course of human nature points to the conclusion that a human legislative power of universal character and world-wide extent does not exist and has never existed, nor is it morally possible that it should have done so.

However, an objection with respect to the emperor would straightway present itself [to those who support the view above set forth]. I shall deal with this objection in the following Book.[1]

Thus the whole world—even though it be governed and bound by civil laws, as is morally certain in the case of all nations enjoying any form of civil government and not entirely barbarous—is nevertheless not ruled throughout by the same laws; on the contrary, each commonwealth or kingdom is governed, in accordance with an appropriate distribution, by means of its own particular laws.

And as to how the power in question finds a place within the Church of Christ, or whether it has been specifically instituted therein, these are questions which we shall discuss later.

8. By way of a fourth inference, we may briefly deduce from the discussion [in the preceding Chapter], the ways in which this power to make human laws may be imparted.

In what ways this power of making [human] laws may be imparted.

For it should be pointed out that, originally, the said power can be received directly from God; since there is no other possible origin for it—as we have shown in that previous Chapter—and since God, as the Author of all good things, is therefore the Author of all powers and especially of this power. For the latter most particularly rests upon divine providence, being necessary to good moral conduct, and to the proper preservation and government of mankind. Consequently, the said power must have been transferred to some possessor immediately 209

[1] [Bk. IV, chap. iii, which is not included in these *Selections*.—Tr.]

by God; for if it resides mediately in any being, it necessarily resides immediately in some other being, since it cannot be traced back *ad infinitum*.

There are two ways, however, in which this power may be derived from God; that is to say, it may be derived naturally, as from the Author of nature, or supernaturally, as from the Author of grace. We shall treat of the latter mode in Book Five,[1] but the first has been sufficiently expounded in our previous discussion.

Accordingly, it is furthermore clear that the power in question may [also] be received immediately from men, and mediately from God. Indeed, such is usually the case with regard to natural power. For though it resides immediately in the community, it is conferred through the latter upon kings or princes or senators, since it is rarely or never retained in the community as a whole in such a way as to be administered immediately thereby. Nevertheless, after that power has been transferred to a given individual, and even though it may pass as the result of various successions and elections into the possession of a number of individuals, the community is always regarded as its immediate possessor, because, by virtue of the original act of investiture, it is the community that transfers the power to the other possessors. The case is similar to that of the papal power which, in spite of the fact that it is transferred to various persons in turn, as the result of various elections, comes always to every one of these persons from God, its immediate source.

9. But we must distinguish at this point between two customary modes in which any power may be held; that is to say, it may be held as ordinary, or as delegated power.

For what we have said above holds true with respect to ordinary power; since such power is indeed derived immediately from God, in the case of the community, and transferred by the community to the prince in exactly the same way, so that he wields this power as its proper owner and as one entitled to it by virtue of his peculiar office.

With respect to the second mode, however, a question may be raised as to whether such power can be delegated. That question is suggested by Bartolus (on *Digest*, I. i. 9, qu. 2 at beginning, subques. 5, no. 20) and by Panormitanus (on *Decretals*, Bk. V, tit. xxxix, chap. liii). Moreover, this doubt may have reference to all human legislative power, both supernatural and natural and with respect to every status. Such would indeed seem to be the scope of the question as it is raised by the authors above-mentioned. These authorities lay down without qualification the doctrine that the said power is capable of being delegated; a conclusion drawn by Panormitanus from the following phrase in the afore-cited Chapter of the *Decretals* [*ibid.*]: 'Certain

Bartolus.

Panormitanus.

Panormitanus.

[1] [Not included in these *Selections*.—Tr.]

citizens of Pisa, deputed by popular power to promulgate the statutes of the city', &c. The same inference is customarily derived also from the first law of the *Code* [I. i. 8, § 33].

10. But we must note that there are two ways in which this commission or delegation may take place.

First, there may be a delegation of power to frame a law, decreeing whether or not it is just, useful or necessary, and in what terms it shall be incorporated; but the power of the delegate does not extend to the ability to endow the law with binding force nor, consequently, to the ability to promulgate it as law. In this sense, it is manifest that the power in question can be delegated; although, in point of fact, this constitutes a delegation, not of jurisdiction, but simply of a form of ministry that requires knowledge and skill. This kind of delegation, then, would seem to be effected by way of consultation, as it were. And speaking from this standpoint, the said delegation takes place daily. Indeed, it would hardly be possible, otherwise, for laws to be made by princes, since the latter could not accomplish unaided all that is necessary to the process of legislation. Moreover, the laws cited above, if duly examined, prove this point and no more.

What power is capable of being delegated.

From the other standpoint, then, we have true delegation when the promulgation of a law is entrusted to any person in such a way that he is able to give it authority and validity, by his own will and independently of the confirmation or approval of the delegating party. This mode of delegation is neither so frequently nor so easily employed [as the first mode]. Accordingly, Bartolus (in the passage cited above) makes a distinction between the community and the prince, saying that the community may delegate this power when holding it in its ordinary phase and when able to wield it in accordance with the community's own choice and will; whereas the princes and judges to whom this jurisdiction has been entrusted—continues Bartolus—may not delegate it; because, in the first place, their [personal] activities are required when this charge is committed to them, so that they may not transfer the said charge to another (as is argued in *Digest*, I. xxi. 1), and furthermore because the power in question would seem to exist in those [princes and judges] solely in a delegated form and therefore may not be subdelegated by them.

Bartolus.

11. However, passing over the first member [of Bartolus's distinction], which is clearly valid, we find that the second requires explanation. For if it is understood as referring to the emperor, to kings, and to other princes, into whose hands this power of the state has been absolutely transferred, a false doctrine is involved; since in the case of such princes the power in question is not delegated but ordinary, inasmuch as it is perpetual and pertains to them by virtue of their

office. Moreover, these princes may grant that power in its ordinary form to certain inferior states or rulers; why, then, may they not transfer also the function of delegating the same power? For in truth, there is no obstacle, in so far as concerns the power itself, which renders it incapable of being delegated. Bartolus himself upholds this supposition; and its truth is rendered still more clear by the fact that any power of a purely jurisdictional nature—such as the power under discussion—is capable of being delegated. Accordingly, the transfer of the said power from the state to the prince is not a delegation but a transfer (as it were), that is to say, an unlimited bestowal of the whole power which [formerly] resided in the community; and therefore, just as it was possible for the community to delegate that power, so also is it possible for the prince to make a similar delegation. Neither is the said power committed to him in such a way as to require his [personal] activities any more truly than this requirement is made in the case of the community. On the contrary, the power is granted to him absolutely, to be used by him personally or through agents, in that way which seems most expedient to him. Moreover, in the light of this same reasoning, the Pope, too—and not only the Pope but bishops, also—may delegate their legislative power whenever they are legislators with ordinary power; so that the arguments adduced above are [likewise] valid with respect to them.

12. Thus the opinion set forth by Bartolus applies solely in the case of those magistrates and judges to whom the power in question has been delegated by the supreme sources of power. For the arguments advanced by Bartolus are valid only in those cases. To be sure, since he refers particularly to communities, a verification of his opinion may be found in those commonwealths which are free in fact and which retain in themselves the supreme power, though they commit the task of legislation to a senate, or to a leader, [and in the latter case,] either to the leader alone or to him in association with the senate. For such legislators are perhaps simple delegates; and they will consequently be unable to delegate [, in turn,] their own power, unless this very ability is expressly provided for in the delegation [of power to themselves], or unless it is rendered clear by the light of custom that the power in question has been committed to them with that provision, a supposition which relates to fact rather than to law, so that we cannot make a more definite assertion as to this point. Furthermore, we are for the same reason unable to make any statement with regard to the actual delegation of this power, that is to say, any statement as to the persons in whom such delegated power may reside; for this is a matter which depends upon the free exercise of the will, and concerning which nothing is decreed by the common law.

What power is incapable of being delegated.

CHAPTERS V–XXXI

Omitted from these *Selections*

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334

CHAPTER XXXII

ARE THE MUNICIPAL LAWS OF ANY KINGDOM OR DOMAIN BINDING ON THE MEN OF THAT DOMAIN, WHEN THEY ARE DWELLING OUTSIDE ITS TERRITORIAL LIMITS?

1. There are four ways in which any person may be related to a given domain or diocese: first, as a permanent inhabitant[1] thereof, actually living and residing therein; secondly, at the opposite extreme, as one who has neither of these relations with the domain in question; thirdly, as a permanent inhabitant of this domain, having his domicile therein, but dwelling abroad at the time; fourthly, as being present in the said domain, but having neither domicile nor origin therein.

There is no occasion for dispute with regard to the first and second situations. For, as to the first, what was said in the preceding Chapter[2] has special application, since all the elements necessary for the actual status of a subject and consequently for the binding obligation of law are present in this first case. In the second situation, on the other hand, it is clear that there is no possibility of legal obligation, because there is no title existing under which the status of a subject may be imposed. But in connexion with the third and fourth, there are two doubtful questions which must be discussed.

2. The first question is stated in the title of this Chapter. There is indeed cause for the doubt indicated therein, since the subject, although he is actually living or travelling outside the boundaries of his own state, always remains a subject, as long as he does not change his domicile, and since we have already said[3] that the law binds all subjects and all parts of the community, wherefore the law is binding, even in the case in question. The confirmation of this view is drawn, first, from an argument based on [the absurdity of] the converse supposition: for an inhabitant of another kingdom, while dwelling in this one, is not bound to observe the laws of the latter kingdom, a fact which seems to be expressly defined in the *Decretals* (Bk. V, tit. XXXIX, chap. XXI); and therefore, he must be under the obligation of observing the laws of his own domain, since if he were not so bound he would be freed, solely on account of his absence, from the obligation of obeying the laws of either country, an assumption which is evidently absurd.

The reason for the doubt.

Decretals.

The second confirmation of the same view is that if a bishop makes a rule for the diocese in question, ordering for example that all persons subject to him, who enjoy a benefice within that diocese, must reside therein during a given period of time under pain of a given

[1] [*incola.*—TR.] [2] [Not included in these *Selections*.—TR.]
[3] [Bk. III, chap. XXXI of *De Legibus*, which is not included in these *Selections*.—TR.]

punishment or censure, then he so binds the holders of such benefices, wherever they may be, that if they do not return to the diocese within the prescribed time, they incur the said penalty or censure, as a general rule, apart from ignorance of the order on their part, or inability to comply therewith. Hence, a provincial statute is binding upon those belonging to a diocese, even while they are travelling elsewhere; and therefore, the same is true of any similar law.

3. Nevertheless, it must be stated, that no law is binding outside the limits of the territory of the superior or prince by whom it is decreed; so that the inhabitants of that country, generally speaking, do not sin if they violate the law in question while they are outside this territory. Such is the common opinion of the Doctors on the *Sext* (Bk. I, tit. II, chap. ii) and on the *Decretals* (Bk. V, tit. XXXIX, chap. xxi); of Sylvester (on word *excommunicatio*, Pt. II, no. 7); as also of Angelus de Clavasio and the other summists (on word *lex*); and of Covarruvias (on *Sext*, Pt. I, § 10, no. 3). This conclusion is derived from the passage in the *Sext* already cited (Bk. I, tit. II, chap. ii), in which it is stated that one who is living outside a particular diocese and disobeys a law made by the bishop thereof, does not therefore incur the sentence imposed by that law. However, the reply may be made that in the passage under discussion, the reference is not to the binding authority of the law, but rather to the censure, and that in the latter case the principle involved is different; for the imposition of a censure pertains not to the directive, but to the coercive power of the law, and therefore is not a practice to be extended outside of the territorial limits, since the superior or judge may not punish outside of the territory, although he may issue orders and impose obligations. This would appear to be the meaning of the Pope when he adds, in explanation of the above-mentioned passage (*Sext, ibid.*), these words: 'since he who pronounces judgment outside the territory [of his jurisdiction] may be disobeyed with impunity'; for pronouncing judgment is the same as passing a sentence. Nevertheless, the intention of the Pope was doubtless to assert that the statute involved was not [actually] violated by the subject in such a situation; that it is for this reason that the subject does not incur a censure; and that, therefore, even the directive force [of the law] would not be binding in the said situation. Moreover, the person who does not obey the statute, under the circumstances supposed, is not contumaciously disobedient to the Church; and this in turn is an indication that the person in question is not bound by that statute, even with respect to its directive force. The truth of the antecedent is evident, since if the said subject were contumacious he might accordingly be excommunicated, and consequently would incur a legal censure. For excommunication, to follow the more

The negative conclusion: this is the opinion commonly held.

Sext. *Decretals.* Sylvester. Angelus. Covarruvias.

probable opinion, may be inflicted upon an absent subject, even though he be dwelling in foreign territory, provided a sufficient cause for censure is assumed to exist; and contumacy is a sufficient cause, according to the passage (*Matthew*, Chap. xviii [, v. 17]): 'If he will not hear the church, let him be to thee as the heathen and publican'. Therefore, just as [liability to] a censure does not bind an absent person, neither does a law. It clearly follows that, although the statute in question may have been published without any provision as to censure or penalty, but simply with the force of a directive law binding in conscience, nevertheless, it will not be binding upon absent subjects, since its power to lay an obligation upon the conscience is not enlarged by reason of the censure [of the court]. For the imposition of a censure rather assumes the existence of jurisdiction and the power to bind; and when a censure is attached, the jurisdiction [of the law] is not for that reason extended[1] or restricted. Thus, from the text cited, the best argument may be drawn as to any law proceeding from a power limited to a definite territory; and whether this law be ecclesiastical or civil, the same conclusion in due proportion holds true.

4. But all the authorities do not agree as to the rational basis for the assertion in question.[2] For some explain the fact stated, by referring it to the intention of the legislator, on the ground that he intended merely to bind the subjects living within his own territory; wherefore these persons say that the conclusion which we have laid down is true only if the law is couched in general terms, since in that case, no other—that is to say, no more extensive—intent on the part of the lawmaker, is expressed; and, therefore, if the legislator declares in explicit terms that he wishes to bind [all] subjects, wherever they may be, then—according to those [who favour the opinion above set forth]—the law is binding even upon subjects outside the territory. Thus the persons who hold to the said opinion limit the aforementioned statement in the *Sext*, (Bk. I, tit. II, chap. ii). In favour of the view in question, Bartolus (on *Code*, I. i. 1, nos. 44 *et seq.*) is usually cited. However, this stand, as ascribed to Bartolus, is criticized by Panormitanus (on *Decretals*, Bk. V, tit. XXXIX, chap. xxi); Navarrus (*Enchiridion*, Chap. xxvii, no. 272); Sylvester, *ibid.*, [Sect. 3]; Covarruvias, *ibid.*, [Sect. 3] and all the other authorities. And the matter is made entirely clear in that passage of the *Sext*, *ibid.*, where the Pope states the reason for his proposition, as follows: 'since he who pronounces judgment outside the territory [of his jurisdiction] may be disobeyed with impunity.' These words indicate a defect not merely of will, but also of power, a fact which is self-evident and which

Bartolus. Panormitanus. Navarrus. Sylvester. Covarruvias.

[1] [Reading *extendatur* for *extenuatur*.—TR.]

[2] [i.e. 'no law is binding outside the limits of the country of the lord or prince by whom it is decreed'; &c. Cf. *supra*, § 3, p. 396.—TR.]

is, moreover, corroborated by the *Digest* (II. i. 20), whence the assertion in question has been taken, the commentators being commonly agreed upon this point in connexion with the latter passage, also.

Therefore, the true reason for the statement under discussion is that the jurisdiction of any one state or particular prince does not include the power of making laws which shall be valid outside the state or kingdom; a fact which I have elsewhere expounded more fully, in a passage where I have treated of other phases of this matter (*Vol. V, De Censuris Ecclesiasticis*, Disp. V, sect. IV[1]), which pertain more especially to censures. Neither is this reason entirely alien to the mind of Bartolus; for he touches upon it in the place cited, [on *Code*, I. i. 1, nos. 44 *et seq.*] and draws this very conclusion from the *Digest* (I. i. 9), in which [civil] law (*lex*) is defined as the particular law (*ius*) of any given state.[2] Therefore, just as in philosophy we are accustomed to say that an action does not continue outside its sphere of activity, owing surely to a defect of power and not of will; even so the activity of jurisdiction in the making of any law is limited to a specific territory, and hence that law is not binding outside those territorial limits. Therefore, it is clearly to be inferred that the lawgiver cannot bind a subject outside the existing boundaries of the state, even if he has a decided intention of doing so, and expressly states that intention in the words of his [law].

5. But we must interpret the foregoing as referring to the peculiar directive obligation imposed by law upon the conscience, for this is the proper and immediate effect of law.

When a prince may punish a delinquent subject outside of his own territory.

If, however, one is discussing coercion by means of a penalty, it is the opinion of the jurists that when a subject has committed a crime outside of the state, the prince may inflict upon him the punishment imposed by his own law for his own territory, provided that the penalty is not imposed *ipso iure*, but is still to be imposed, and provided that the crime thus committed outside the realm is later punished within that same realm. Thus Abbas [i.e. Panormitanus] (on *Decretals*, Bk. V, tit. XVII, chap. i, no. 8) teaches; and indeed it will be found that this is all that Bartolus meant in the passage cited, if that passage is carefully read.

The reason for the opinion above set forth is that under the conditions specified the penalty is imposed not outside the territory in question, but within it; for it is assumed that this punishment must be imposed by human agency, and judges do not inflict punishment upon or exercise power over those who are dwelling outside the territory, but do so only when the latter return to the country. This view,

[1] [Not included in these *Selections*.—TR.]

[2] [Suárez wrote: . . . *Lex dicitur ius proprium civitatis*. The *Digest* (*loc. cit.*), has: *Quod quisque populus ipse sibi ius constituit, id ipsius proprium civitatis est vocaturque ius civile, quasi ius proprium ipsius civitatis*. The point of the reference is that the *Digest* recognizes particular law.—REVISER.]

then, is not in conflict with the *Sext* (Bk. I, tit. II, chap. ii): for, in the first place, it has reference [only] to statutes accompanied by a sentence of censure, through which sentence the censure is inflicted *ipso iure*; and, furthermore, that kind of a statute necessarily supposes and requires a peculiar power to lay a binding obligation upon the conscience, rendering the transgressor contumacious and worthy of censure. By the same token, the reason set forth in the *Sext* (*ibid.*) does not conflict with the limitation in question, since a legal precept designating the penalty to be imposed even for a crime committed outside the limits of the state, and the execution of that precept, are not equivalent to 'pronouncing judgment' outside the territory [of the lawmaker].

336 6. Hence, also, we clearly see the rational basis for this difference between a law imposing punishment *ipso facto*, and a law merely declaring a punishment that is to be imposed. For the first kind of law of itself inflicts a penalty and thus necessarily extends its binding character and power of execution outside its own territory; and this it cannot do otherwise than by obliging the guilty person to execute the penalty upon himself, which is impossible, as has been proved. For if the law in question cannot compel one to, or restrain one from an action, much less will it be able to compel one to the execution of the penalty. Whereas a law which imposes a penalty that is to be inflicted by a judge, is by the very nature of the case, a statute binding the judge to act in accordance with it, rather than a statute binding upon the criminal; and the judge dwells within the territorial limits of the state. The objection may be raised that the [guilty] subject is also bound in conscience to submit to the punishment in question. Our reply is that the said subject, strictly speaking, is not bound by this law until after sentence has been passed, when he is assumed to be already within the limits of the state.

Hence Panormitanus has rightly noted that it is necessary not merely that any crime punishable by such a law should be evil because it is forbidden by the law in question, but also that the supposition should exist that the deed is essentially evil, or in some other way sufficiently forbidden. For that law, as has been proved, can not itself prohibit the deed, outside of the limits of the state; and therefore it can not designate any penalty for the same, unless the deed is for some other reason assumed to be evil or sufficiently prohibited.

7. As to the reason for the doubt which was mentioned at the beginning [of this Chapter][1] we may reply, in accordance with what has been said above, that a subject living outside the territorial limits of the state, although he does not lose his status as a subject in the essential sense

A reply to the arguments to the contrary.

[1] [*Vide* Section 2, p. 395.—TR.]

—or basically, so to speak—does nevertheless lose that status, in a temporary sense; that is to say, he ceases to exercise it in relation to the laws of his country, since he is living beyond the range of their [normal] operation.

However, in the first confirmation of [the view set forth in Section 2 of this Chapter], it is pointed out that a certain difficulty exists in connexion with the interpretation of a statement in the aforesaid Chapter xxi [*Decretals*, Bk. V, tit. xxxix, chap. xxi], which pertains rather to the following point. Briefly, then, I answer that the statement in question refers, not to a statute or law, but to a general sentence, or a personal and temporary precept. As to the difference arising from this fact, and the reason therefore, I shall speak presently of these points.

Exposition of *Decretals*, V. xxxix. xxi.

8. In regard to the second confirmation [of the above-mentioned view], the Doctors add certain limitations to the proposition stated [in connexion with the said confirmation]. This may be deduced from Sylvester, [on word *excommunicatio*, Pt. II, no. 7] and from Angelus de Clavasio (on word *excommunicatio*, Pt. I, no. 10), who reduce the limitations to this principle: that, outside of the territory in question, no one is bound when the agent, and the object of the operation, and the action itself, are entirely without the limits of the state. Whence it is to be inferred that if the agent is outside, while the object with respect to which he offends is inside, then the obligatory force of the law may be applicable. Covarruvias, however, explains this limitation in different words, although their ultimate significance may be the same; for he says that a law is not binding outside the limits of the state, unless the subject-matter of the law has in view the welfare of that same state, that is to say, the avoidance of injury or harm to it, or some similar purpose.

Sylvester.[1]

Covarruvias.

In my opinion, this is the true doctrine. I have explained it more fully in a passage already cited [Vol. V, *De Censuris*, Disp. V, sec. iv][2]; and from the statements made there, I infer that, strictly speaking, the proposition in question is not limited by the said doctrine, since offences contrary to a law of the sort under discussion should be considered as having been committed, not without, but within the territory [of the lawmaker]. For if the law is, for example, affirmative, directing that some act be performed within the state, the failure to observe this law is considered to have occurred where the prescribed act should have been performed, since one would seem to perpetrate an offence in that place in which he fails to do what he ought, just as, on the other hand, he would seem to sin wherever he does what he should not have done. This analogy is borne out by a statement in the

[1] [This marginal reference to Sylvester incorrectly appears after Covarruvias in the Latin text.—Tr.]
[2] [Not included in these *Selections*.—Tr.]

Digest (L. xvii. 121). But if the law be negative, and if its transgression shall result in an injury to the state, then the offence is clearly consummated in that state: even as a person corporally outside the limits of the state or kingdom would, if he shot an arrow and thus killed a man within those boundaries, be clearly held to have sinned in the territory of the said state, thus transgressing the law and incurring, in consequence, a liability to the censure, if the latter should be provided for by the law in question: all of which I have said in the passage cited above. These remarks, then, are applicable to the second confirmation, and constitute a sufficient comment upon it.

9. There may be some doubt as to whether the same assertion may be made with respect to exempt localities when they are otherwise enclosed within a state. But this doubt occurs more frequently in connexion with the canon, than with the civil laws; and, besides, I have treated of the question sufficiently in the place above-mentioned [*De Censuris*, Disp. V, sect. iv].[1] Therefore, I shall simply state that the same assertion does indeed hold true with respect to localities of this kind; a reply which is, as I have said in the aforesaid passage, the common solution of the question. This opinion is held also by de la Palu (on the *Sentences*, Bk. IV, dist. xviii, 2d part of quest. 2, art. 2) and by Gabriel thereon (on the *Sentences*, *ibid.*, concl. 6), by Antoninus (*Summa*, Pt. III, tit. xxiv, chap. lxxv, § 1) and is supported by the *Summa Rosella*[2] (word *excommunicatio*, Pt. VII, 337 § 3), the *Armilla*[3] ([word *excommunicatio*,] No. 30) and by the canonists (on *Sext*, Bk. I, tit. xvi, chap. vii and on the *Constitutions* of Clement, Bk. V, tit. vii, chap. ii). The same view is supported by the laws above cited, in so far as it may be inferred from them that a prelate cannot exercise his jurisdiction within the exempt territory, a limitation which applies to every superior. From this fact, we draw the conclusion that the exempt locality, in so far as jurisdiction is concerned, is considered as outside the [enclosing] state; since, except in cases expressly mentioned in the law, an ordinary superior of the said state may not execute therein any act of jurisdiction; and the act of binding by a statute or law, in the place exempted, is an exercise of jurisdiction in that place; as is evident from the *Sext* (Bk. I, tit. ii, chap. ii), already cited. Therefore, the same argument exists in regard to the exempt locality; and to that locality one may well apply the principle under discussion, namely, that 'he who pronounces judgment outside the territory [of his jurisdiction] may be disobeyed with impunity.'

The same assertion, due proportion being observed, may be made with respect to exempt localities when they are enclosed within a state.

de la Palu. Gabriel. Antoninus. *Rosella*.

[1] [Not included in these *Selections*.—Tr.]
[2] [*Summa Rosella, liber qui Rosella casuum appellatur*.—Reviser.]
[3] [*Aurea Armilla* by Bartholomeo Fumo, O. P.—Reviser.]

CHAPTER XXXIII

ARE THE MUNICIPAL LAWS OF A GIVEN DOMAIN STRICTLY BINDING UPON ALIENS WHILE THEY ARE LIVING WITHIN THAT DOMAIN?

1. I have treated of this question at length in Vol. I, *De Religione*, Tract. II, bk. II, *De Festis*, Chap. xiv,[1] in connexion with the precept for the observance of festivals; and therefore, avoiding repetition in the present context, I shall note briefly the points which I there set forth and shall add certain observations more suited to this passage.

Three elements, then, must be distinguished in every law: first, its binding force with respect to the conscience, which I call its directive force; secondly, its coercive force, by means of which one may be punished according to law; and lastly, the force by which a definite form is laid down for contracts and similar legal acts, so that it sometimes happens that an act otherwise performed is not valid. The question placed at the head of this Chapter will be considered in relation to these three points, since they present their own difficulties.

Three elements are to be distinguished in law.

2. Regarding the first element there are various opinions, which I have set forth in the place cited [*De Religione, ibid.*].[1]

Those who hold to the first opinion absolutely deny that a person may be bound by the laws of any place, unless he has a fixed and perfect domicile therein. In favour of this view, I have cited as authorities, in the passage already referred to, de la Palu, Medina, Archidiaconus, Hostiensis and others; but I myself have rejected the view as improbable.

The basis of the negative opinion.

de la Palu.
Medina.
Archidiaconus.
Hostiensis.

According to the second opinion, the laws of a locality are binding upon those aliens who are permanent residents of that locality to the extent, at least, of establishing a quasi-domicile therein; but this binding force does not hold with respect to other persons living in the said locality for a brief season, or passing through it. I have cited Felinus, Antoninus and others, in support of this opinion.

The second opinion.

Felinus.
Antoninus.

However, the basis of both views is very nearly the same, namely, that non-resident foreigners are not subjects; for the status of subject, in so far as concerns the direction of conduct, and binding obligation, is acquired only through domicile, or, at least, through quasi-domicile. In addition to this argument based on reason, [certain supporters of the theory stated above] cite the example of unbelievers who are not bound by the laws of Christians, although they live among the latter; the example of members of religious orders in relation to secular persons; and that of novices in relation to professed religious. But I shall pass over these instances, since they are not pertinent; for they have to do not only with those who pass through a territory, but also with those possessing a fixed domicile in it. Of these cases I shall speak later (Bk. IV, last chapter).[1]

Proof by means of examples.

[1] [Not included in these *Selections*.—Tr.]

The confirmation [of the theory in question] may be derived from the disadvantages [which would result if the opposite were true]; for, in that case, unbelievers when passing through Christian territories would be bound to observe the laws or rites of Christians, abstaining from meat on the days when it is prohibited, and so forth, which would be absurd. Moreover, the monks residing in the territory in question would be obliged to observe the synodal fasts, and such an obligation would be a grave burden, since they have many other fasts of their own, which the laity are not bound to observe, according to the decrees of the regulars. It would also follow that a religious of a given province is bound to observe the fasts, festivals, and laws on similar matters, peculiar to another country, when he is a guest therein, even if these regulations are not common to his whole organization. And in like manner, a novice would be bound to observe the rules of a religious order as long as he dwelt in the house of that order. But these suppositions are not acceptable.

3. Nevertheless, it must be asserted that the law of a locality is binding in conscience upon aliens and guests as long as they dwell therein, and in the same way as upon the permanent inhabitants. This is the common opinion of those who have interpreted *Code*, I. i. 1 and *Decretals*, Bk. V, tit. xxxix, chap. xxi, especially Innocent [IV], Hostiensis, and Panormitanus; it is brought out also in a passage of the *Sext* (Bk. I, tit. II, chap. ii), on which Geminiano and Sylvester (word *excommunicatio*, Pt. II, no. 4) have commented fully; and I have likewise referred to many others in the place cited. I have verified this same opinion by citing the authority of Augustine and the custom of the Church, as well as by various arguments.

The law of a territory is binding in conscience upon aliens while they live therein, and in the same way as upon permanent inhabitants.

Innocent.
Hostiensis.
Panormitanus.

Geminiano.
Sylvester.

Augustine.

The true reason, however, is that a law is made for general application within a given territory, as we assume, and is therefore binding, for the period of their residence, on all persons actually living therein.

The deduction is proved, first, because from the standpoint of the final cause it is morally necessary for the good government of a province, locality or territory that the laws made for the same should have this [universally binding] effect; for it is necessary to peace and good conduct in that locality that aliens should conform to the customs of conduct of its people, as long as those aliens live with the people in question;

338 **It is necessary to peace and good conduct in any locality that aliens, while they are living in that locality, shall conform to the customs of conduct of its people, lest scandals result.**

[1] [Not included in these *Selections*.—Tr.]

a fact which is frequently indicated in the *Decretum* (Pt. I, dist. XII, can. IV; Pt. I, dist. VIII, can. II; Pt. II, causa XVI, qu. VII, can. XXII), and which experience makes sufficiently clear. For otherwise, disputes and scandals would result. Therefore, since laws are established with a view to the common welfare, peace and good conduct of the country, it is necessary that they should possess the [universal] force in question.

Secondly, the same conclusion may be proved from the standpoint of the efficient cause, that is to say, from the standpoint of the legislator's power. For every civil governor has the power necessary to preserve his state and to safeguard its morals; therefore, he has also the power to make laws which are binding upon all living within his domains; since it is on this ground that he is empowered to punish aliens who commit crimes therein; hence, by reason of these faculties he possesses [likewise] the power to bind by his laws all persons engaged in activities within his realm, in so far as such an act of compulsion is necessary to the welfare of his realm.

4. Thirdly, the same truth is evident from the standpoint of the aliens, since there are grounds sufficient to justify their subjection to such an extent that they may be bound by the laws of the territory; and this degree of subjection is all that is required. Therefore, the truth of the major premiss is evident partly because power in the sovereign and subjection in the governed are correlative, and we have proved the existence of the power in the prince, so that there is a corresponding subordination in the other extreme; and partly in view of the fact that, just as this obligation is (as it were) transient and relative, even so a temporary subjection (so to speak) is sufficient therefor, the sole requirement for that subjection being actual sojourn and presence, even though the sojourn may be of short duration. For just as a man in changing his domicile from one place to another by this very act manifests his will to be bound permanently by the laws of that new territory, or else becomes bound in consequence of his act and despite his will to the contrary; even so any person who wills to sojourn in a given locality for a brief time, by that very act manifests or should manifest a will to subject himself temporarily to the government of that territory, in everything relating to general habits of conduct and laws. This statement is confirmed by the converse argument. For an inhabitant of any territory, withdrawing from it for a brief period, at once and throughout that period ceases to be bound by the laws thereof, according to the argument of the preceding Chapter; and consequently, during that time, he is not actually a subject. Hence the converse will also hold true; for the principle is the same, and equity demands that in both cases equality—that is to say, due proportion—shall be observed.

Proof of the above proposition, from the standpoint of the aliens.

5. The basic argument of the contrary opinion has been refuted by the foregoing remarks. For we have already proved that in the case posited neither jurisdiction nor subjection is lacking, and we have elsewhere demonstrated (*De Censuris*, Disp. V, sec. IV)[1] one by one the following points: first, that a quasi-domicile is sufficient to establish the obligation in question; secondly, that a sojourn of a few days will suffice; and finally, that the said obligation should be extended in a proportionate degree to travellers remaining for a brief period in a guest-house. Moreover, what we said in that same passage, with respect to the law on the observance of festivals may well be extended to all laws, including those of a civil nature, with which, also, we dealt there in passing, but at some length.

The reply to the basic argument of the contrary opinion.

It may furthermore be added incidentally that this doctrine is applicable to religious persons who are pilgrims or guests in alien provinces or religious houses, in so far as relates to the peculiar regulations of those provinces or houses. I mention this fact, because some writers hold that persons of a religious calling, when travelling, are exempt from such regulations on the ground that they have no territory of their own, since the spirit of religion may be [considered as being] diffused throughout the whole Church. But this fact does not prevent the religious from having their own domiciles, according to the argument in the *Sext* (Bk. V, tit. VII, chap. i); and as to the point in question, the separate monasteries and provinces may have their own observances. We hold, then, that aliens are bound by these, for the time that they remain in such surroundings, due proportion being observed; for the principle involved is the same [as that in the case of the permanent residents], unless religious custom itself concedes to the aliens some particular exemption.

In what fashion this doctrine may be applied to persons of religious calling.

6. Finally, it is evident from the foregoing that certain persons have been mistaken in saying that aliens are bound to observe these laws, merely to avoid scandal. For this is not true. If it were, they would not, in the absence of [possible] scandal, be bound in an absolute sense and in secret, to obey these laws. Therefore, it must be stated that, although the occurrence of actual scandal accidentally increases the obligation, nevertheless, scandal is not therefore the true basis of the obligation; on the contrary, it is at most an occasion or motive which impels the legislator to make the law. But the obligation to obey this law does not lapse even if the particular motive does lapse; just as the carrying of arms in a given place or at a given time is

Not merely on account of scandal are aliens bound by the laws of the locality, but also because of the laws themselves and because those aliens are in a sufficient state of subjection.

[1] [Not included in these *Selections*.—TR.]

forbidden in order that quarrels may be prevented, and women are forbidden to adorn themselves in this or that specified way, that scandal may be avoided, while nevertheless, after the laws have once been established, the obligation to abstain from these acts exists not merely on account of the scandal, but *per se*, by reason of the laws themselves. So it is in the case under discussion; for the necessity of 339
avoiding scandal and of maintaining morality within a state may cause the making of laws for all who are living in that locality; and, accordingly, after the law has been made, aliens are bound to conform thereto, not only for the sake of avoiding scandal, but also because of the law itself and because they are in a sufficient state of subjection, as has been explained.

7. But one may ask whether a law for any state or territory may be made which is binding only upon the aliens dwelling therein. For Innocent [IV] says (on *Decretals*, Bk. V, tit. XXXIX, chap. XXI) that such a law cannot bind non-resident foreigners unless it is formulated in general terms, and is binding *per se* upon the inhabitants and concomitantly (as it were) upon the non-residents. It may be that Innocent was influenced by the fact that the principle of uniformity, and of the accessory which follows upon the primary factor[1] would apply in the latter case; whereas this principle could not be applied if the law related only to non-resident foreigners, who, essentially and directly, are not subjects of the commonwealth or prince in question.

Innocent.

A doubt.

Nevertheless, I think that the contrary opinion is true—a view which Hostiensis supports, on this same passage [*Decretals*, Bk. V, tit. XXXIX, chap. XXI, no. 7], also; Panormitanus, more decidedly; and Sylvester, too. The principle, however, is the same, applied in due proportion; for it concerns the general welfare of the state or commonwealth to regulate the manner in which non-residents shall conduct themselves while there, and to determine the means necessary for this end. Otherwise, the state would not be sufficiently protected. Nor can such power reside in any source other than the state itself or its governor, since the guardianship and care of the locality have been entrusted to him. Therefore, just as the said non-residents have a peculiar mode of living, that is to say, of being located in a given place, so in many matters they may require special statutes. Hence, they may be bound by such statutes; since they are constituted subjects to this extent by the mere fact of their sojourn, as we have already pointed out. But we assume that these laws must be just, and suitable, not only

Hostiensis.

Panormitanus. Sylvester.

The true answer.

A law may be enacted for any country, binding upon such aliens as reside therein when such a law could promote the common welfare.

[1] [An example of this maxim would be a promise confirmed by oath. The oath is accessory: the promise is the primary factor or principal. If the promise lapses, the oath lapses also.—Reviser.]

to the locality in question but also to the non-residents themselves, observing a due proportion between the two; for thus the said laws will satisfy every qualification for placing those non-residents under a valid obligation.

8. On the second point, regarding coercive force, that is, the question of whether by that force also a law is binding upon foreigners —in other words, upon non-resident aliens—a special reason for doubt is derived from the *Decretals* (*ibid.*), in which the following question is raised: when a bishop issues in his diocese this general decree, 'If any one shall be guilty of stealing, let him be excommunicated,'[1] will the decree be binding upon aliens? To this the Pope replies that it is binding only upon the subjects of that bishop, a reply for which there can be no other reason than the fact that the bishop does not have coercive power over aliens, but has it only over subjects.

On coercive force: the reason for the doubt.

Decretals.

The Gloss thereon [on *Decretals, ibid.*] replies, as to this point, that such a decree of excommunication applies to foreigners, not as such, but in so far as they have become subject by reason of their offence; and accordingly holds that the text [of the Pope's answer] must be interpreted as referring to those who are subjects by whatsoever title. However, this explanation in reality inverts the force of the Pontiff's response, and renders it frivolous and absurd. For that is the very point at issue, namely, whether the said aliens are subject by reason of their offence; hence [the Pope] is speaking of subjects, not in the sense employed [by the Gloss], but in that in which inhabitants are designated simply as subjects. Furthermore, a certain inconsistency is involved in the reply quoted from the Gloss. For in a case of punishment by excommunication, the proximate reason for the subjection of the offender cannot be the fact that an offence has been committed in a given place; on the contrary, one must necessarily assume the existence of an obligation to obey the prelate of that locality, since for excommunication there must have been contumacy in regard to the Church, and since an offence against the natural law, as such, is not a sufficient ground. This being the case, as I presume from the very nature of the question, a condition of subjection existing before the commission of the offence must consequently be assumed, from which subjection arises the obligation of obeying a law embodying a given prohibition under pain of excommunication. Hence, since the discussion in the text concerns this censure, aliens may not be classed as subjects by reason of an offence, but are termed thus, because they were inherently subjects, before the law or offence in question existed. So also Panormitanus and others interpret this same text [on *Decretals, ibid.*],

The reply contained in the Gloss is rejected.

Panormitanus.

[1] [This quotation, as given by Suárez, varies slightly from the text of the *Decretals*.—Tr.]

admitting, in consequence, that aliens are not included under the censure when it is imposed in a general decree.

9. Nevertheless, it must be admitted that a law made for a given territory does apply, even as to its coercive force, to non-resident foreigners who linger therein; that is to say, such foreigners may be punished in that territory for the transgression of the said law, either through a judge, or through the force of the law itself, if the latter carries with it a penalty, *ipso facto*. This is the opinion of the authors cited above, as well as of the commentators on the *Decretals* (Bk. V, tit. XXXIX, chap. xxi). The reason is evident, since the same title of subjection, or power, is operative in regard to this coercive force, as that which was shown to be valid in regard to directive force. Indeed, directive power would not be efficacious unless coercive power were annexed thereto. Besides, if an alien is bound, essentially and in conscience, to obey the law of a particular state, then, by transgressing that law he commits an offence in that territory and against that state; and therefore, by reason of this offence also, he remains subject to the coercive power of the commonwealth in question, according to an *Authentica* on the *Code*, III. xv [*Novels*, LXIX, chap. i]. 340

The opinion of the author.

10. However, the following limitation is usually added: that the non-resident foreigner shall not be superior in rank to the author of the law in question, since no superior can be subjected to an inferior by coercive authority. For instance, if a bishop should impose a prohibition upon his clerics under pain of excommunication to be incurred *ipso facto*, and if his metropolitan should act contrary thereto, even in the bishopric of the former, that metropolitan could not [by this act of disobedience] incur the penalty of excommunication. This fact is noted by Sylvester (on word ***excommunicatio***, Pt. I, no. 9) and by Panormitanus, on the *Decretals* (Bk. V, tit. XVII, chap. i, no. 11 [no. 12]), the latter touching upon the same point elsewhere (on *Decretals*, Bk. II, tit. II, chap. xx).

Sylvester.

Panormitanus.

Soto also expresses this opinion in a passage (on the *Sentences*, Bk. IV, dist. XXII, qu. 2), wherein he extends the rule to apply to prelates of equal rank, saying that neither the archbishop, nor another bishop, offending within the diocese of a suffragan or bishop, can be bound by the censure of the latter. Panormitanus, however, rightly asserts that this principle applies to a superior in jurisdiction; for although one prelate may be the equal or even the superior of another in dignity, while he remains within the diocese of the latter, he can be bound by its laws, wherefore he can also be bound by its censures or punished on account of an offence committed within that diocese.

Soto.

This holds true with respect both to ecclesiastical laws and to

civil laws, according to an opinion also expressed by Innocent, on the *Decretals* (Bk. I, tit. XXXIII, chap. xvi), and supported by the *Digest* (I. xviii. 3). The reason for this view is that a dignity without jurisdiction does not exempt the person enjoying that dignity from subjection because of an offence, just as it does not exempt him from the obligation of obeying the law violated; and therefore, such dignity is incidental (so to speak) in relation to jurisdiction.

Innocent.

The foregoing holds true [only] from the standpoint of ordinary law, and on condition that a given person is not [specifically] exempted by reason of the said dignity; for in that case, one bishop cannot be punished by another bishop of equal rank.

One bishop cannot be punished by another of equal rank.

On the other hand, when any person is superior in jurisdiction, it is clear that he may not be bound by an inferior (*Decretals*, *ibid.*). Moreover, just as such a superior is not subject with respect to coercive power or punishment, neither is he subject with respect to directive force or obligation in so far as this obligation exists by virtue of a law; for the principle is the same in regard to both sorts of subjection, the law itself being dependent upon jurisdiction. Whether or not the person in question may be bound for some other reason, however, is a point which we shall discuss later, when treating of the lawgiver himself;[1] for as to this question almost the same principle holds.

11. Therefore, in answer to the objection made on the basis of the *Decretals* (Bk. V, tit. XXXIX, chap. xxi), it must be said that in that passage the reference is not to a law or to a statute, but rather to a precept or sentence passed by an individual, although it may be made in general terms; a fact which is clear from the text, and which is agreed upon by all the interpreters thereof.

Decretals.

The passage cited from the *Decretals* refers not to a law or to a statute, but to a precept or sentence passed by an individual.

But it is necessary to explain the difference between a statute and a precept, that is, a general sentence passed by an individual.

The difference between these.

Panormitanus thereon (*Decretals*, *ibid.*), gives the following answer: such a sentence operates [only] at the time when it is passed, so that it binds only those whom it finds at that time suited to be so bound; whereas a law is always operative and therefore always binding [even] upon persons who have newly become subjects.

However, this answer is not acceptable, first, because according to the *Decretals* (*ibid.*), a general sentence of the sort described does not include foreigners, even if they are actually present within the territory affected thereby

The explanation given by Panormitanus is rejected.

[1] [Bk. III, chap. XXXV of *De Legibus*, which is not included in these *Selections*.—Tr.]

when the sentence is promulgated; but if a precept or sentence is framed in terms of a statute it will apply to foreigners; and therefore a distinction must be drawn [between the sentence passed by an individual and the statute], and not merely in relation to persons subject at some future time, even if we assume that equal subjection—that is, equal presence in the territory affected—exists [in both cases]. Secondly, the explanation given by Panormitanus is unsatisfactory, because even in relation to the future, the distinction in question does not hold good. For if, through a precept issued by an individual, sentence is declared in regard to some offence that may be committed in the future, such a sentence likewise holds good for that future time; it has reference always to that time; and it extends its application to persons newly born in the region affected, as well as to those who newly transfer their domicile thither, even if the said persons were not subjects at the time when the precept was imposed.

Another point to be considered is that a statute not only prescribes or forbids, but also punishes of its own force and *ipso facto*, and contains within itself a sentence legally framed; but the obligation imposed by the precept [of an individual] extends, no less than does the binding force of a legal sentence, to those who, after the first publication of such a statute [or precept], come into the territory in question and there commit the offence. Consequently, as far as this point is concerned, there is the same principle applicable [to a statute, and] to a general precept issued by an individual and including a general sentence which imposes a penalty, *ipso facto*, upon future transgressors. For if in the case of a statute one takes into consideration that permanence whereby it is always applicable and therefore always binding, why shall not the same quality of permanence be considered in the case of a precept issued by an individual, which also endures, according to his intention, so long as he lives or while he remains in office? And if, on the other hand, in the case of a [violated] statute it is understood by a fiction of the law that judgment is handed down at the time when the offence takes place in a given territory, even if that offence is committed by a foreigner who recently has come thither, then why will not the same legal fiction hold good of a judgment declared in the precept of an individual?

12. Therefore, I maintain that the distinction to be drawn is due 341 to the differing characters of a law, and a simple precept issued by an individual. For a law, as I have said previously[1] is perpetual; while the precept of an individual is transitory, and easily subject to change. Hence it follows that a law by reason of its perpetuity is likened to custom, and is held to be well known to all, and laid down for observance by all.

The difference between a law, and a simple precept issued by an individual.

[1] [*Supra*, p. 125; *De Legibus*, Bk. I, chap. xii.—Tr.]

On the other hand, the precept of an individual has not this equivalence to custom, nor is custom introduced thereby, since a precept is easily changed, nor is it wont to be so widely known; so that a precept of itself binds only the inhabitants of a territory, its true and permanent subjects; whereas a statute is binding upon all who reside in that territory.

Therefore, another distinction should be taken into consideration, namely, that a law (*lex*) is made for a given territory, since it is the 'law of the state' (*ius civitatis*) as Bartolus said, or 'law of the territory', (*lex territorii*), according to Panormitanus, and consequently is binding by means (so to speak) of the territory itself; that is to say, in so far as the persons bound dwell within that territory, just as a local interdict binds those living in a given locality. On this account a statute, outside the territory for which it is decreed, has no binding force over persons who are in other respects subject to it, a fact which we have noted above.[1] On the other hand, the precept of an individual—that is, a personal precept—is directly applicable to the persons of all subjects, so that it presupposes subjection and is therefore not binding upon aliens even when they are living in the territory affected. On the contrary, it may bind subjects even though they are living outside of that territory, as I have said elsewhere (Vol. V, *De Censuris*, Disp. V, sect. v),[2] in a passage wherein I made many observations on this difficulty. Here, however, I have merely attempted to indicate wherein the doctrine in question is applicable to all human laws, including civil laws.

13. A third point proposed above [Section 1, this Chapter] is whether or not a law prescribing a given form for legal trials, contracts, or other similar acts, and invalidating those carried out in any other form, is efficacious within its territory, even over non-subjects.

The third [element, or source of] doubt.

Upon this point, it must be briefly said that, in this respect, also, the law must be obeyed in its own territory, and that the act in question must be adjudged in accordance with that law. Such is the opinion held by Bartolus, Jason and others, on the *Code* (I. i. 1); by Felinus, on the *Decretals* (Bk. IV, tit. 1, chap. i, nos. 2 and 23 *et seq.*); and, with excellent comments, by Panormitanus (*Consilia*, Pt. II, no. 52), and Tiraqueau (*De Iure Primogenitorum*, Qq. 46 and 48). The meaning of this statement, indeed, is that an alien who makes a will or contract in a given territory, ought to observe in so doing the form prescribed by the laws of that realm. Therefore, when the said form is not observed, the contract in question is invalidated by the force of the disregarded law, and will be void even though made by an alien; a rule which holds also with regard to the other acts mentioned.

An alien making a will or contract ought to observe therein the form prescribed in the locality where he is.

[1] [*Supra*, p. 395; chap. xxxii.—Tr.] [2] [Not included in these *Selections*.—Tr.]

The reason for this fact is that the said law is a rule governing the act itself, in so far as relates to the power of binding by virtue of locality, as I have already pointed out.[1] Therefore, this law obliges all persons in that locality to observe also the form of procedure which it prescribes; and, just as it includes the power to punish, so also it includes the power to invalidate. [The truth of] the consequent is made evident by the same reasoning [as that applicable to the antecedent], and also by the fact that the act in question is subject to the law without qualification; and, therefore, that same act is subject in relation to its entire validity. The confirmation of this statement is that acts which require a certain customary form and solemnity are not valid without the support of law (*Digest*, II. xiv. 6); and in the situation described above, the law does not support the act, but rather is opposed to the same; therefore, that act will have no validity. Finally, in matters and acts of this kind, the local custom should be observed; and consequently, the local laws should also be observed. This doctrine is supported by those same civil laws to which the authors above cited refer at length; and since these laws fall properly within the field of those authors, I will not tarry longer over a discussion of this point.

The confirmation.

14. However, from the foregoing remarks, we may infer that the validity of the acts in question, and their binding force in the court of conscience, must be viewed in accordance with laws of this character; since a positive law nullifying such actions has the same effect upon their binding force. The same statement must be made with regard to legal trials; for they should be carried on in accordance with the form and mode prescribed by the laws of the place in which they are conducted; and to these laws, therefore, the alien litigant must conform. Otherwise, that is to say, if his actions are rendered null by the local laws, he will achieve no valid result. And the same holds true with regard to other [acts of a legal nature, on his part]. We assume in all cases, however, that the laws are just and have regard to the property located in that place, and to the acts performed therein; since the said property and acts must be subject, on the ground of locality to the jurisdiction of the territory in question, even if [the person involved] is not subject thereto inherently and in a personal sense, that is to say, not subject in matters apart from the locality; all of which the above-cited authors set forth at greater length.

Hence it is inferred that a positive law nullifying the validity of the act, consequently nullifies its binding character.

At this point there arises the question of taxes, and whether a foreigner is bound to pay them. This point, also, must be settled according to the principles stated above. For if a tax is owed by reason of property

In what sense an alien is bound to pay taxes.

[1] [*Supra*, p. 403; § 3, this Chapter.—Tr.]

located in a certain place, or an act performed in that place, then there will be an obligation to pay that tax, even on the part of an alien, generally speaking, and assuming that the tax is a just one. But such an obligation does not exist with respect to other taxes, which are of a personal nature. On this entire question, I shall have much to say in Book V.[1]

[1] [Not included in these *Selections*.—Tr.]

FRANCISCO SUÁREZ

A TREATISE ON LAWS AND GOD THE LAWGIVER

BOOK VI

ON THE INTERPRETATION, CESSATION AND CHANGE OF HUMAN LAWS

Only Chapter IX of this Book is included in these *Selections*

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CHAPTER IX

ARE THERE OCCASIONS WHEN A LAW, AS A WHOLE, AUTOMATICALLY CEASES TO EXIST, WITH THE CESSATION OF ITS CAUSE?

1. Since a law is essentially perpetual, and is enacted for the sake of the community, it is manifestly incapable of lapsing through the disappearance of its efficient cause.

A law is of itself perpetual, and it is enacted for the sake of the community.

For a law does not cease to exist because of the legislator's death, nor because his successor dies, a point that is clearly demonstrated by our earlier discussion[1]; and therefore, it is not abolished by the mere passage of time, since it should [as a general rule] be established as valid for an indefinite period. If, indeed, it is occasionally possible for a law to be enacted with reference to a specified period, that is nevertheless an exceptional occurrence and such a law carries with it—subjoined, as it were—its own abrogation, which is to become effective at the time so specified and which comes under another class of annulment, discussed below [in Chapter xxv].[2]

Again, laws do not lapse from any defect on the part of those for whom they are enacted. For a state or a people, viewed as a community, is essentially perpetual, persisting through a continuous process of succession; and though a given state, or people, may suffer complete annihilation, such an event is rare and, practically speaking, does not call for consideration.

Therefore, the only way in which a law can cease to exist is as the result of a change in the object to which it relates. This change, in a physical sense, may occur in any one of various ways; but for present purposes we need to consider only such changes in the subject-matter of laws as concern the essential reason for the imposition of the legal obligation upon that subject-matter. For, assuming that the said reason persists, the [corresponding] law will not cease to exist on the ground [of a change in its object]; and accordingly, it will not in any sense cease to exist, unless it is repealed, since it is derived from no other mutable cause as a factor in its preservation, a point which we have made [above, in Book I, chapter x].[2]

If, however, a change does take place in the object of the law, that object being regarded from the standpoint above specified, then, whatever may be the source of this change, we are confronted by the same question, namely: whether or not, by virtue of the said change in its subject-matter, the law itself ceases to exist; for this is equivalent to

[1] [*De Legibus*, Bk. I, chap. xx, which is not included in these *Selections*.—Tr.]
[2] [This Chapter is not included in these *Selections*.—Tr.]

inquiring whether, upon the complete disappearance of its entire reason or end, the law also disappears, being altogether extinguished and abolished. But I have employed the phrase, 'upon the complete disappearance of its entire reason'. For we are not at this point concerned with cessation in regard to some particular act, nor with any 666
similar change of a partial character, transpiring only on one occasion, or with respect to a given part of the law's subject-matter and for a given period of time; inasmuch as our discussion of this partial change, contained in the preceding Chapter [Chapter viii],[1] will suffice. It would indeed be possible to consider in this context a different aspect, of partial change, either perpetual change affecting some notable part of the subject-matter of the law, or temporary change affecting the whole of that subject-matter; but I shall deal with these aspects in closing.

2. The other distinction, however, which was also laid down in the preceding Chapter[2] (a distinction turning upon the two ways in which the [essential] reason or end of a law may cease to exist, namely, contrary and negative), most emphatically demands consideration at this point: partly in order that we may see whether or not both [modes] may relate to the law as a whole, and partly in order that we may explain which of these [modes] leads to the disappearance of the law itself.

The cessation may be either contrary or negative.

The object of a law, then, is said to alter by contrariety,[3] whenever—as the result of a change in subject-matter or in [external] considerations or circumstances—the observance of the law becomes unjust, or somehow evil; or if its observance is rendered impossible, or at least so difficult and laborious as to be considered impossible for practical purposes and with respect to the community as a whole; or, finally, if such observance comes to be wholly useless and vain from the standpoint of the common good. On the other hand, a negative change will take place when the reason for the enactment of a law has departed entirely from the subject-matter thereof, although, despite the disappearance of that reason, the subject-matter in itself is neither evil, nor impracticable, nor useless, nor unjust.

3. Whenever there occurs, then, in the entire subject-matter of a law, a change resulting in a contrary effect,[4] no occasion for doubt or argument arises. For all authorities acknowledge that under such circumstances the law *ipso facto* ceases to exist; inasmuch as these very circumstances divest

A change with contrary effect[4] destroys the validity of a law.

[1] [This Chapter is not included in these *Selections*.—Tr.]
[2] [Not included in these *Selections*.—Tr.]
[3] [The terminology is technical and impossible to translate without circumlocution. Cessation of law is said to be *contraria*, when its observance would be harmful. It is said to be *negativa*, when the reason for the law has ceased to exist.—Reviser.]
[4] [i.e. an effect through which the observance of the law becomes harmful or impossible.—Tr.]

it of its just character, wherefore it is divested of its character as law, since (as we have often said, quoting Augustine [*On Free Will*, Bk. I, chap. v]) an unjust law is not law. Augustine.

The antecedent is clearly true. For a law enjoining anything wrong, impossible of fulfilment, or devoid of usefulness for the common good, is unjust and null, a point which is made manifest by our discussion in Book I[1]; and as the result of a change with contrary effect occurring in the object [of a prescription], the thing prescribed becomes wrong, impossible of fulfilment, or useless, as we have already explained; therefore, if a law should continue to exist [after such a change had transpired], it would then be enjoining something wrong and would thus itself be wrong, or else impossible or useless, wherefore it would be unjust.

Consequently, in the event of such [a change], it is not necessary for the prince to revoke the law before the latter can licitly be disobeyed; nor is it necessary even that the said law be abolished by custom, since its non-observance becomes just prior to the introduction of that custom; and for these reasons I have declared that the law ceases, *ipso facto*, to exist. This truth is, indeed, self-evident whenever the very observance of the law becomes wrong, since the continued existence of an obligation to do wrong is inconceivable.

Moreover, the same assertion applies when [this observance] becomes impossible; for no one is bound to attempt the impossible. Furthermore, in so far as relates to the community, a virtual impossibility suffices [to dissolve the obligation]. Accordingly, when such an impossibility presents itself,[2] the law in question ceases *ipso facto* to exist for the community. Therefore it also ceases to exist for individuals.

The same reasoning is once more applicable when the subject-matter of a law becomes useless and vain from the standpoint of the common good. For, by virtue of that fact, such subject-matter is rendered incapable of imposing a legal obligation upon the community, and consequently, incapable also of imposing it upon individuals.

It is necessary, however, that such a change, effected universally in the entire subject-matter of the law, shall be a clear and evident fact; for, in doubtful cases, a law always retains its rightful force and foothold (so to speak) and the presumption is always in favour of the justice of the law. The chief argument in support of this contention is the fact that, when the change is not evident and clearly apparent to all, a lack of significance and universality in that change is indicated. Therefore, in so far as concerns this point, there seems to be no need of additional

There must be evidence of such change before the law can lose its force.

[1] [Chapter ix of the *De Legibus*; *supra*, pp. 105 *et seq.*—Tr].
[2] [This English clause is an interpretation of a single word, *tunc*, in the Latin text.—Tr.]

distinctions as to greater or lesser doubt. On the contrary, certain knowledge should be absolutely required, although it will suffice if this knowledge is based upon the public and undeviating opinion of the people.

4. Accordingly, we are now confronted solely with a certain difficulty in regard to those occasions on which the essential reason for the law ceases generally to exist, but in a negative sense only. For it would seem that such a cessation does not suffice to destroy the force of the law as a whole.

The first argument in support of this view is as follows: the same proportion and relationship apparently exist between the whole [reason] and the whole [law], as those which exist between the respective parts; but, when a negative[1] cessation takes place in a particular case, in the reason for a law, the obligation imposed by the law does not [on that account] cease to exist; and therefore, when there is a general cessation of the reason, the law as a whole is not thereby destroyed.

Secondly, it is argued that the negative cessation of the reason for a law is not manifestly attended by an immediate cessation of the will of the prince; therefore, the law does not necessarily pass immediately from existence. The consequent is clearly true, because it is from the will of the prince that the law derives its binding force. The antecedent, moreover, has been proved above[2]: for it is possible either that the will of the prince may be motivated at the outset by several reasons, of which the principal one or the one best known—not the whole number—is declared by him; or, at least, his will may be motivated by one reason at the outset, while the motivation is continued later by a different reason, as we remarked previously in our discussion of tributes.[3]

A third argument is this: when the reason or object of a law ceases in a purely negative sense, the law can still be observed without 667
sin; consequently, by virtue of the same binding force, it should be observed as long as it has not [positively] been revoked. The antecedent is an assumption based on the very meaning of the terms involved. The truth of the consequent is proved, indeed, by the fact that under the circumstances described no peril is involved in the observance of the law, whereas great peril may attend its transgression, partly because the cessation of the prince's will cannot immediately become a certainty, and partly because grave moral evils might ensue if so extensive a licence were granted to the people.

Finally, one could cite, in support of the same view, those writers who declare that a law does not cease to exist although the reason for

[1] [The Latin at this point has *illo modo*, evidently referring to *negative*, above.—Tr.]
[2] [*Supra*, pp. 51 *et seq.*; *De Legibus*, Bk. I, chaps. iv and v.—Tr.]
[3] [*De Legibus*, Bk. V, chap. xiii, which is not included in these *Selections*.—Tr.]

the law may disappear. To these authors I have alluded at the beginning of the preceding Chapter [Bk. VI, chap. viii].[1]

5. Nevertheless, the commonly accepted opinion is that a law ceases to exist, when the reason for the law disappears in a general way, that is to say, more frequently than not in regard to the community as a whole.

On what occasions a law ceases to exist upon the disappearance of the reason for the law.

This opinion is, first of all, the view of those persons who assert that, when the reason for a law disappears in a particular case (even though this cessation be purely negative), the obligation imposed by the law also disappears, in so far as concerns that particular case. For these same authorities are compelled, *a fortiori*, to make a similar assertion with respect to total cessation. Accordingly, we may cite Panormitanus, on the *Decretals* (Bk. III, tit. XLIX, chap. viii [, no. 38]) in support of the said opinion. Innocent, Antoninus and other writers mentioned in the preceding Chapter[1] clearly indicate, in their comments on this passage, that they support the same view. The point is more clearly made, to be sure, by Peter Ledesma ([*Theologiae Moralis*,] Pt. II, chap. iv, qu. xvii, art. 2, 3d doubt, ad 4 and qu. xviii to 12th doubt after the second conclusion, and 14th doubt after the third conclusion), and by Covarruvias (on *Decretals*, Bk. IV, pt. II, § 9, no. 8 and *ibid.*, Bk. III, tit. XXVI, chap. x, no. 9) where he cites Fortunius (*De Ultimo Fine Utriusque Iuris Canonici et Civilis*, Illat. xv and xvi). Castro (*De Potestate Legis Poenalis*, Bk. I, chap. v, docum. 3) upholds a like opinion, as do Cajetan (on II.-II, qu. 147, art. 5, and in other passages above cited) and, in general, the commentators on St. Thomas (I.-II, qu. 96, art. 6). Soto expresses himself in a similar manner, but he appends a limiting condition which it will be necessary for us to consider before recording his true argument and solution.

Panormitanus. Innocent. Antoninus. Ledesma. Covarruvias. Fortunius. Castro. Cajetan. St. Thomas. Soto.

6. A question may be raised, then, as to whether, when the reason for a law ceases in a general way to exist, we should conceive of the law as also ceasing to exist, *ipso facto*, in such a way that its non-observance on the part of the subjects would be licit, nor would it be necessary for them to await a proclamation or revocation by the prince; or whether [, on the other hand,] we should say that the law becomes void for the reason that with the disappearance of its cause, the prince is bound to abolish that law.

For the remaining authorities (with the exception of Soto), even though they may not expressly bring up this point, are clearly referring to cessation *ipso facto*. Confirmation of their view[2] may be found in the fact that if that view were not correct,[3] the disappearance of the law in this special mode would not differ from a revocation thereof; rather,

[1] [Not included in these *Selections*.—Tr.]
[2] [Simply *hoc*, in the Latin.—Tr.]
[3] [Simply *alias*, in the Latin.—Tr.]

at most, a legitimate cause for abrogating the law would be assigned in consequence of the said [mode of disappearance], even as many other causes may be assigned. A further confirmation is the fundamental assumption that an effect ceases with the cessation of its cause; an assumption which is understood to refer to cessation *ipso facto*, as we deduce from a chapter of the *Decretals* (Bk. II, tit. XXIV, chap. XXVI). Thus the explanation of this cessation is customarily concerned with the true and adequate cause on which the effect depends for its continued existence, in accordance with the purport of the Gloss on that passage, and more clearly with other parts of the Gloss (on *Decretals*, Bk. I, tit. IX, chap. xi, word *cessante*; on *Decretum*, Pt. I, dist. LXI, can. viii, § 2 (*Sed sciendum*), word *causa*; on *ibid.*, Pt. II, causa I, qu. vii, can. vii, and the text itself). But when we speak in the present discussion of the cessation of the cause, or reason, or end of a law, we are speaking [precisely] of the adequate cause; otherwise, it would not be said, that the cause ceases in an absolute sense. Therefore, when this adequate cause ceases, the law also should cease, *ipso facto*, for both the will of the prince and the utility of the law are dependent upon the said cause. Accordingly, if such a reason had not existed from the beginning, the law could not have been set up justly; and therefore, it cannot justly be kept in existence independently of that reason.

Gloss.

7. Nevertheless, Soto clearly supports the contrary view. For he says (*De Iustitia et Iure*, Bk. I, qu. vi, art. viii): 'If the cause has totally ceased to exist, then the law also should cease to exist; nevertheless, it does not lose its force until it is abrogated by the prince or by custom.'[1] It is evident that Soto is speaking here of the negative cessation of the cause, since he denies that its occurrence with regard to a particular instance would suffice to deprive the law of its binding force in that instance. In another passage (*ibid.*, Bk. III, qu. iv, art. v, ad 1) he practically repeats this assertion, saying: 'For though it may be incumbent upon the prince to change this [law], it is not permissible for his subjects to act in opposition thereto, so long as the natural law concedes permission (that is to say, permits the thing legally prescribed), unless [the precept in question] has become contrary to natural law.'[1] Soto, then, does not believe that a law ceases to exist *ipso facto*, before abrogation, so long as the reason therefor does not cease in such a way that the thing prescribed becomes contrary to the law of nature.

To be sure, he does not state the basis of his opinion, but he does indicate that, as long as the subject-matter of a law is capable of involving a binding obligation, so long will the law endure, provided it is not repealed. Yet the subject-matter of the law does not become in general incapable of involving such an obligation simply because the

[1] [This quotation, as given by Suárez, varies slightly from Soto's text.—TR.]

reason for the law ceases to exist. For this subject-matter may [still] be not evil, and [even] useful to the state, though it may not be such as it was formerly nor [absolutely] necessary, as it was before; because this [change in the reason] does not sufficiently justify the immediate and necessary conclusion that the said law is abrogated.

A confirmation of the foregoing argument may be derived from the objections [to the opposing view]. For it is contrary to a due
668 regard for order that the law laid down by a superior should be disobeyed without his consent, as long as it is licitly and easily possible to obey that law, inasmuch as such disobedience may give rise also to scandal and disturbances or to fraud within the state. A middle course, then, may be pursued in our deductions, as follows: when the cause or reason of the law ceases in a general sense, the law also ceases, in itself and *ipso facto*; but, in spite of this cessation, the subjects cannot licitly begin to act in opposition to the said law before the prince has proclaimed its cessation, because this limitation is expedient for the common good. We arrive at that conclusion in the same way as we arrived at the assertion made by us in the preceding Book,[1] namely, that a penalty is often incurred *ipso facto*, but has no binding force before a declaratory decree is issued.

8. In order to expound my opinion, I assume from what has been said above that the subject-matter of human law is twofold.[2] For one phase of that subject-matter is of such a character that, viewed in itself, it is righteous and involves an act of virtue. Examples of this sort are the precept on fasting, that on praying, and so forth. The other phase is in itself of a neutral character. Examples of such subject-matter are the bearing or not bearing of arms; the taking of this or that object from a given place, and similar instances.

The subject-matter of human law is twofold.

In consequence of this dual subject-matter, there arises another difference, relating to the laws themselves. For, inasmuch as all human laws establish some deed of commission or of omission as coming under the head of a given virtue or vice (a fact which we have already pointed out), consequently, when the subject-matter of a law is essentially and of itself endowed with a righteous character, it is established proximately through the said law under the head of that virtue to which of itself and intrinsically it pertains. For example, fasting is put into the category of temperance, while omitting to fast is intemperance; and other examples could be pointed out, in like manner. Moreover, the same holds true in all cases in which a standard of virtue may, through the efficacy of a law, be founded upon such subject-matter. A case in point is that of the law fixing a given price. For,

[1] [Not included in these *Selections*.—TR.]
[2] [*Supra*, pp. 47 et seq.; *De Legibus*, Bk. I, chap. iii, §§ 17 *et seq.*—TR.]

prior to the establishment of the law, this price did not represent a standard of justice; but after it has been determined by the law, it does embody such a standard; and, therefore, the act prescribed by the said law is put into the category of justice, while the violation of the law becomes an act of injustice.

On the other hand, when an act is itself of a neutral character and is not prescribed by any law that makes of it an intrinsic standard of virtue, but is legally prescribed or prohibited simply because of its utility in the attainment of some extrinsic end—when such is the case, all the righteousness of the act must be ascribed to the said end, on the basis of which righteousness[1] the act becomes in its turn obligatory and necessary, by the force of the law.

Thus we come at length to the conclusion that, in so far as concerns the laws of the first group,[2] the extrinsic end of the subject-matter involved in a precept is never adequate for the law; since intrinsic righteousness and the characteristic of virtue are directed always to a proximate and intrinsic end, and to an end, moreover, which is in itself sufficient, though every extrinsic end cease to exist. As for the laws of the second group,[3] however, the extrinsic end is [necessarily] adequate [to justify the various precepts], inasmuch as their subject-matter is not essentially and for its own sake an adequate [justification] of these precepts, being adequate only because of its utility in regard to some extrinsic end.

9. Accordingly, I hold, first: that a law prescribing an essentially good act, establishing it as falling intrinsically within the subject-matter of virtue, does not cease to exist because some extrinsic end of the law wholly disappears; even though [this end] may be all that is required in so far as the legislator's intention is concerned, and may perhaps have been so regarded [by him] that he would not have made the law independently thereof.

A law prescribing an [essentially] virtuous act does not cease to exist, upon the disappearance of an extrinsic end.

A proof of this assertion is supplied by the argument set forth in defence of Soto's opinion. For, despite the disappearance of every extrinsic end, the subject-matter of such a law remains in itself righteous, and suitable for law by the sole force of the intrinsic end involved, that is to say, because of the righteousness of the act in question; furthermore, this intrinsic end is always sought by the legislator, since he based the necessity and means for the said act upon this kind of virtue; consequently, despite the disappearance of every extrinsic[4] end, the law possesses a sufficient justification

[1] [Assuming that the Latin word *illa* is not a misprint for *illo*. If we read *illo*, the translation will perhaps be smoother: 'on the basis of which', referring to the extrinsic end. –Tr.]

[2] [i.e. those laws whose subject-matter is in itself a standard of right conduct.—Tr.]

[3] [i.e. those laws whose subject-matter is in itself of a neutral character.—Tr.]

[4] [Reading *extrinseco* with the 1856 edition, not *intrinseco*, which is the term here used. The context clearly indicates that the former reading is correct.—Tr.]

for its continued existence; and, therefore, it will not be rendered void.

A confirmation of the foregoing argument will be found (if the matter is carefully examined) in the fact that, under the circumstances described, the adequate cause of the law does not cease. For the most potent cause, end and proximate reason (so to speak) of the said law, consist in the righteousness of the act which it prescribes. Therefore, there is no reason why the law should cease to exist.

Finally, as long as the prescribed subject-matter together with the formal reason therefor shall endure, the obligation imposed by the precept remains. For, as St. Thomas has declared (I.-II, qu. 100, art. 9, ad 2), what the legislator purposes to prescribe, is one thing, while the end for which he purposes to prescribe it is another; and accordingly, just as the precept is of itself binding with respect to the former, and not with respect to the latter, even so, conversely, as long as the former endures—and provided that it shall continue to include a reason sufficient to justify the precept, this precept, too, will endure, though its extrinsic end may cease to exist. St. Thomas.

The point may be clarified by means of examples. For though a law on fasting be established for the purpose of mortifying the flesh, and though a community be conceived of which does not need such a means for the attainment of that end inasmuch as it possesses many other means [for the same] or a similar purpose, this law—I repeat—will nevertheless be binding, a fact not open to dispute; but if the act prescribed by it should cease to be an act of temperance, as might occur in a case of extreme necessity, then, indeed, the law would lapse. Similarly, if some law should fix the price of wheat, the binding force of that law would endure, even if all the extrinsic reasons or other advantages thereof should disappear, as long as that price con-
669 tinued to be equitably just in the sense that it did not become manifestly inequitable; but if, on the other hand, the situation should alter to such a degree that the sum fixed would be manifestly unjust, the law would cease to exist. Similar illustrations could be drawn from other situations.

10. Accordingly, one infers that if the adequate end, both intrinsic and extrinsic, of the law in question should cease to exist, then the law itself would cease. However, careful reflection will show that in such a case the end does not simply disappear in a negative sense, but is transformed with contrary effect, since the subject-matter does not retain its virtuous character, but rather becomes vicious, so that it is incapable of serving as subject-matter for a binding law. Evidence confirming this assertion is found in the fact that, under the circumstances described, the binding force of the law

When the adequate end of a law, both extrinsic and intrinsic, ceases to exist, the law itself ceases.

will lapse not only in general but also in particular cases, with respect to the act or the subject-matter involved. Accordingly, it also happens, that in such a case the law ceases *ipso facto*, without any other revocation[1] or declaration [of its cessation]. For it lacks a foundation, nor can its binding force be applied to unsuitable subject-matter.

A common example is offered by laws imposing tributes for certain works or ends. When such a work or end has been accomplished, the law of itself ceases to exist, because the reason for the law then ceases, not merely in a negative sense, but even with contrary effect, inasmuch as the tribute becomes from that moment unjust. When, on the other hand, the intrinsic end does not cease to exist, although the extrinsic ends disappear, then just as the law itself does not *ipso facto* come to an end, even so it is not necessary that this law be abrogated by the prince. For the righteousness of the subject-matter may suffice to sustain the law; unless the latter becomes from some other cause harmful to the state, or intolerable; since in that case there might be another reason creating an obligation to repeal the law, or that law might even come to an end of itself, provided that its harmfulness and oppressiveness are of a general character and excessive in their degree. For such a cessation, as is clearly evident, would be not of a negative, but of a contrary nature.

Furthermore, and lastly, I must note with respect to this [first] assertion[2] that it refers to law in the strict sense of the term. For in so far as concerns precepts laid down by an individual, solely by virtue of the obedience due to him, these may frequently be such that, when their end or cause ceases to exist, the obligation imposed by them also ceases, even though the act prescribed is in some other respect intrinsically righteous, as in the case of fasting or praying. For example, if a superior should prescribe that a fast be observed once a week during a particular month; if it is evident that the precept is imposed because of some special need or occasion; and if this need or occasion comes to an end before the month expires, then we consider that the precept, too, has ceased to exist. For, in the case of such precepts, the whole reason for prescribing, consists in the extrinsic end involved, not in the intrinsic[3] righteousness, although the latter is presupposed. Evidence of this truth is afforded by the fact that the transgression of such a precept is not an act of intemperance, for example, but one of disobedience; whereas we find a different situation in the case of a true law. Such a law aims primarily at the rectitude of virtue under which the prescribed act is classified as if by its very essence.

The difference between a law and a precept.

[1] [Reading *revocatione*, in accordance with the Paris edition of 1856, not *recordatione*, the reading of our own Latin text.—Reviser.]

[2] [*Vide supra*, p. 426; the first sentence of Section 9 of this Chapter.—Tr.]

[3] [Reading *intrinseca* for *extrinseca*.—Reviser.]

11. I hold, secondly: that when an act of a neutral character in itself is prescribed by a law for the sake of an extrinsic end, then, if the adequate end of the said law ceases, in a general sense, to exist, the law itself ceases *per se* and *ipso facto*, as does the obligation which it imposes.

A law prescribing an act of a neutral character, for the sake of an extrinsic end, itself ceases to exist when its adequate end ceases.[1]

The reason for this fact is that, in the situation described, the negative cessation of the end is transformed into a contrary effect, inasmuch as it unfits the subject-matter in question for law. This assertion is proved as follows: an act which is in itself of a neutral character can never be prescribed of itself or for its own sake; for an act of that sort, considered as such, is not of itself desirable from the standpoint of righteousness; on the contrary, if it is thus prescribed [for its own sake], it will not be rightly prescribed; moreover, it is still more certain that such an act does not afford subject-matter for law, unless it is prescribed for the sake of some common advantage which it may promote or because of which it may be necessary; but when the end of the law ceases in a general sense to exist, the act in question necessarily becomes useless with respect to the common good; therefore, it becomes for this very reason incapable of being rendered obligatory by human law, and the law itself consequently ceases *ipso facto*. The consequents and the major premiss are quite clearly true in the light of our previous remarks. The truth of the minor premiss, moreover, becomes evident through our hypothesis. For we have assumed that the adequate end for the sake of which the act was prescribed, ceases to exist. Yet it is impossible that this should occur save [for one of two reasons]: either because the good which was the proximate aim of the act in question is no longer advantageous for the common good of the state; or else because the act itself is no longer useful with respect to such advantage. But in either case the act becomes useless and vain from the standpoint of the common good, and consequently ceases to be fit subject-matter for law.

It may be objected that, even though the act be useless with respect to the end sought by the law, it may possibly be useful for the attainment of other ends. My reply is that this [objection] is of an incidental and individual nature, since, in so far as concerned the aforesaid act, the law has had regard only to the aforesaid justification of advantageousness and public benefit, so that consequently, when the justification has been removed, the subject-matter of the law ceases to exist and therefore the law, too, ceases. For even though the act in question may be useful from some other standpoint, the law concerning the act was not established with a view to that [other] end;

[1] [Reading *cessat*, with the Paris edition of 1856, not *cesset*, with our own Latin text; and omitting again, in accordance with the 1856 edition, the final and redundant *lex* of our text.—Tr.]

and accordingly, such utility is not regarded as necessary to the state until a law has been established with respect to the said act and in consideration of the said end.

12. From the foregoing, it follows, first, that a situation of this kind does not require a decree of the prince, in order that the law may permissibly be disobeyed after having ceased in the manner described, since that law fails, *ipso facto*. The sole requirement, then, is that this cessation shall be a matter of clear and public knowledge owing to evidence of a fact generally established throughout the state or community. For, by virtue of the very fact that the law ceases to exist in the aforesaid manner, it is no longer law; consequently, it is not of itself binding; and therefore, in order that its cessation may be effective with respect to the community, it suffices if that cessation is publicly known to the said community. 670

A decree of the prince is not required in order that such a law shall cease to be binding.

Nor does any sufficient reason arise, which would make it necessary to await a decree of the prince. For [such a decree, if] it [were required at all,] would be required either as an instrument of repeal, which is not the case, since the law has passed away of itself; or else it would be required as an authentic proclamation, an alternative which it is also impossible to support satisfactorily, inasmuch as this act of proclamation is not necessary in the nature of things, nor do we find it specifically prescribed by positive law. Moreover, one should not, in this connexion, compare the cessation of a law with the incurring of a penalty. For a penalty by its very nature is violent and is imposed from without, wherefore it inherently requires the action or concurrence of a judge, unless the contrary has been expressly provided by law. Consequently, a penalty is not incurred *ipso facto*, independently of any legal declaration thereof; and even if it were incurred *ipso facto*, that would not prevent the passing of a declaratory sentence regarding the crime, save in cases in which the law does [specifically] preclude such a sentence or in which there is some other manifest [cause precluding it], since there always exists a presumption in favour of the accused to the effect that he is not liable to a penalty until he has been condemned. In such a case, however, the cessation of the law is not a violent occurrence; on the contrary, by means of that cessation the state is restored (so to speak) to its pristine status and liberty, while [the law] gives place to that [free status]; and therefore, there is no necessity for a decree of the sort described, to serve as a declaratory sentence.

It will be objected that [a declaration] is required by way of promulgation, for promulgation is necessary in the annulment of a law that is being revoked by the prince. I reply that the principle involved in this case is different; for revocation depends upon the will of the

prince, which must be revealed to all, whereas the cessation of a law when the cause of the law ceases to exist, depends not upon the prince's will but upon the very fact [that the cause disappears], so that it suffices [in this latter situation] if the bare fact is known to all. For example, if a tax for the purpose of building a bridge has been imposed by law, and if it is a matter of public knowledge that the bridge is completed and no more is being expended upon it, such a situation constitutes a sufficient promulgation of the fact that the tax has ceased to be imposed; and other, similar examples might be adduced. Public and sufficiently certain knowledge, then, of a general cessation on the part of the cause is all that is required [as a promulgation of the law's cessation]. And [, at the same time,] this is a minimum requirement. For I do not think it would suffice [as a promulgation] if [the cessation of the cause] were known to this or that particular individual, since the law does not cease to exist with respect to such individuals until it ceases with respect to the whole community, and since, in order that the law may cease for the community, it is necessary that the cessation of its cause shall have taken place in such a way that the fact can be made manifest to the community and becomes accordingly a matter of public knowledge.

The foregoing, moreover, has reference especially to cases in which the observance of a law is becoming unjust, for in such cases the fact of the law's cessation is more clearly evident. Furthermore, a law may be described as unjust, not only when it causes specific harm, but also when it is wholly useless and unjustified by reason.

13. Secondly, the remarks made above may serve to show how acceptable that distinction is, which some jurists have drawn, between a law made for the purpose of doing away with the ills that frequently follow upon a given fact, and [, on the other hand,] a law made essentially for the sake of some [positive] good and utility. For these jurists hold that laws of the former kind cease to exist, with the cessation of the [possibility of such] ills; whereas laws of the latter kind by no means cease, even though the reason for their utility may do so.

A distinction made by the jurists is examined.

This is the view suggested by the Gloss (on *Decretals*, Bk. II, tit. xxiv, chap. xxvi, word *cessante*, near the beginning [word *causa*, near the end]). Proof with regard to the first class [of laws] is afforded by that text and by the example of an oath, which is prohibited solely because of the danger of perjury and is therefore permissible when that danger ceases to exist. Proof as to the second class, on the other hand, is based upon laws in two chapters of the *Decretum* (Pt. II, causa xxxii, qu. i, can. ii; *ibid.*, qu. vii, can. xxvii), which are in no wise pertinent, since they deal with matrimony, an indissoluble bond to which a different process of reasoning applies. The same distinction is Gloss.

Navarrus. Cajetan.

suggested by Navarrus (in *Summa*, Chap. xvi, nos. 36 and 37) in a passage where he agrees with Cajetan that clandestine marriage may have been permissible (at least, before the Council of Trent)[1] upon the cessation of the possibility of consequent ills that caused its prohibition; while he nevertheless declares that the obligation imposed by a law does not cease to exist [merely] because its end ceases with respect to a particular case, if that end was a good to be acquired through a means prescribed by the law. Navarrus then, speaks in this passage not only of the general cessation of a law, but also of cessation in a particular case, as I have noted above.

14.[2] But, as a matter of fact, and formally speaking, there would seem to be no difference [between the two classes of laws in question]. For if a law is laid down for the purpose of avoiding certain ills, the object of that law is the warding off of the ills. Accordingly, the same reasoning applies to the cessation of that object, and to other cases, whether in general or in particular. And therefore, the only possible difference is a material one, so to speak. For a law established solely 671
for the purpose of avoiding certain ills, does not as a rule prescribe any act for its own sake and because of its [essential] goodness, nor does such a law prohibit any act because of its [essential] evil; rather [is it established] in order to avert an occasion for evil; and under these circumstances, when the object [of the law] lapses in a general and negative sense, it lapses with contrary effect, also, since the act in question becomes vain and unfitted to be the subject-matter of law.

Thus we have elsewhere remarked [*De Voto*, Bk. IV, chap. xviii, sect. 4],[3] in connexion with a vow to abstain from entering a certain house (a vow taken in order to avoid an occasion [of evil]), that when this occasion ceases to threaten, the vow is no longer binding. For in such a case, abstention from entrance into the house is a matter of indifference and has no religious significance. The same reasoning, then, will apply in due proportion with regard to a law.

To be sure, a law which prescribes a given act both for its own sake and also in order to promote some good end does not immediately lapse when that end ceases to exist, since in the act itself there may persist the intrinsic righteousness which is the [partial] cause of its prescription. If, on the other hand, [this intrinsic virtue] is not found to exist in the act—which is, on the contrary, of an essentially indifferent nature—then, certainly, we must come to the same conclusion regarding the law which prescribes such an act in order to achieve some good, and the law prohibiting an act in order to avoid some evil. This is sufficiently clear from the foregoing discussion.

[1] [A decree of the Council of Trent, usually referred to as *Tametsi* (Session XXIV, chap. i), invalidated clandestine marriages.—Tr.]
[2] [This Section is incorrectly numbered '41' in the Latin text.—Tr.]
[3] [Not included in these *Selections*.—Tr.]

Conversely, when a law which prescribes or prohibits anything for the purpose of avoiding an evil, does involve subject-matter that is good and advantageous in itself apart from the avoidance of the evil—in that case—the said law would not lapse, even if the necessity for avoiding the ill should cease to exist. For all our remarks in connexion with the first assertion would be applicable in such a situation.

With reference to this point, careful consideration should also be given to the following distinction: whether a thing is prohibited because of the peril [inherent in it], or solely because of its [possible] future effect. For ordinarily a prohibition is laid down on account of a danger which is inherent in the prohibited action itself, so that, even though it is clear and certain that there will be no future effect—that is to say, none of an injurious nature—nevertheless, the obligation and effect attendant upon the obligation will not cease to exist, since the act remains always inherently capable of causing the harm in question, a fact which I have discussed at greater length in the preceding Book.[2]

A distinction which should be carefully considered.[1]

Consequently, the example of clandestine marriage, adduced by Cajetan and Navarrus, is not in my opinion acceptable. For peril is so bound up with that act as to be inseparable therefrom both in general and in particular, and therefore, the obligation imposed by that prohibition never lapses, since it is an unquestionable fact that one ought to guard against all evils. Accordingly, in the sense that marriages made in these days in the presence of the parish priest and of witnesses may be clandestine because of failure to publish the banns in accordance with the prescription laid down in the *Decretals* (Bk. IV, tit. III, chap. iii, § 1), such marriages are illicit, even when the object of the precept prohibiting them ceases, in a negative sense, to exist; unless other legitimate causes present themselves, giving rise to a judgment by *epieikeia*,[3] to the effect that the precept regarding that incidental rite is not binding on a given occasion and at a given time. It is thus, indeed, that Navarrus [*Summa*, Chap. xvi, nos. 36 and 37], finally seems to explain the example in question.

Cajetan. Navarrus.

15. Thirdly, the foregoing incidentally does away with a difficulty, the solution of which was postponed in the preceding Chapter for this context, a difficulty relating to the precept of fraternal correction. The obligation imposed by this precept ceases, even in a particular case, upon the cessation of the hope that correction will be beneficial and, accordingly, through a negative cessation of the reason for the law; so that, in view of the fact that this hope does ordinarily cease

A statement as to when the obligation of fraternal correction lapses.

[1] [The Latin subheading, partially illegible in our own Latin text, should read: *Distinctio diligenter notanda*.—Tr.]
[2] [Bk. VI, chap. xxiii, which is not included in these *Selections*.—Tr.]
[3] [I.e. equitable interpretation. *Vide*, Bk. II of this work, Chapter xvi, *supra*, p. 309, note 1.—Tr.]

in general, we are [apparently] obliged to say, that the precept in its entirety ceases to exist.

B. Medina. Ledesma. Covarruvias.

To this statement, B. Medina [on I.-II, qu. xcvi, art. 6], Ledesma [*Theologiae Moralis*, Pt. II, chap. iv] and Covarruvias [on *Decretals*, Bk. IV, *De Sponsalibus et Matrimoniis*, Pt. II, § 9, no. 8 and *ibid.*, Bk. III, tit. xxvi, chap. x, no. 9] reply that the law of fraternal correction was laid down for the private good of individuals, and therefore may lapse with respect to individuals whenever the end thereof ceases in a particular instance, even though it be merely a negative cessation; whereas this is not the case with respect to laws whose end is general and universal, such laws, for example, as the precept on fasting and others of a similar nature.

To tell the truth, however, I do not sufficiently grasp the meaning of this distinction, nor its rational basis, since all laws exist for the sake of the common good, though this good may be sought and attained, not directly in connexion with the community, but in connexion with individual cases. For the law of fasting is of this nature, being directed to the good of the Church, yet its utility applies to individuals. And so it is that the precept of fraternal correction, too, is a common precept, while its fruit is nevertheless sought among individuals and in particular cases. Accordingly, there is no difference [in this respect] between the two precepts.

Ledesma.

Wherefore, it is easier to reply—as Ledesma also (*ibid.*) briefly indicates—that, in fraternal correction, no part is played by *epieikeia*, nor by a cessation of the obligation involved, resulting from the cessation of the object [of the precept]; for this is an affirmative precept, not continuously binding, nor is there a specified occasion on which it binds, and without this specification, *epieikeia* (as I have above remarked) can play no part. Thus, the obligation imposed by the affirmative precept of fraternal correction does not cease to exist, when there is no hope of fruitful results; rather, this obligation—which is in itself indefinite—is simply not definitely laid down for that occasion, since right reason dictates that it is not binding then, inasmuch as the time is not advantageous, nor is the subject properly adapted. Even so, the precept of almsgiving binds one to succour the needy; and nevertheless, if that succour should be harmful, or if it 672
should be clear and certain that the person in need would not profit by the alms, the precept would fail to be binding, not through a process of cessation nor through *epieikeia*, but because such an occasion would not be one for which the precept in question—being a natural precept, not merely one of positive law—is binding. And I must add that in so far as the reason for the precept can be said to cease in such a case, it ceases not merely negatively, but also by contrariety; for under these circumstances correction would not be an act of virtue, but would

be idle, useless, and possibly harmful, rather than beneficial, to one's neighbour.

16. Finally, from the foregoing remarks, it will be easy to dispose of the reasons for doubt laid down at the outset [Sect. 4, *supra*, p. 422].

The first of these turned upon the objection that the preceding discussion apparently led one to conclude that no difference exists between the general, and the particular cessation of a law, when such a cessation is due to the fact that the object [sought by the law] has ceased in a purely negative sense and proportionately, that is to say, in general and in particular; a conclusion which would nevertheless seem to be opposed to the commonly accepted opinion already set forth. The inference is clearly true, because a law never ceases to exist generally as a result of a purely negative cessation of its object; rather must this object cease in a contrary sense, at least, in the sense of becoming a useless act and consequently unfit to be the subject-matter of a law; and if the object does cease thus in a particular case, the obligation imposed by the law will also cease in that particular case; therefore, [. . .]

[To this objection,] I reply that the difference consists in the following facts: when the adequate object of a law ceases in the manner already described, the absolute reason for establishing the law will cease in consequence, since this cessation of the object is necessarily attended by the loss of all utility for the purposes of law, on the part of the subject-matter; whereas, on the other hand, if the general object of the law persists, even though it may cease with respect to a particular act, the reason for a general law will endure unimpaired, that reason which has regard, not for individual occasions, but for what occurs most frequently; so that, even if the said object ceases negatively in a particular case, the act prescribed does not become useless, nor does the reason for establishing the law cease by contrariety in that case, since this general reason may impel one to the act, for the sake of the general good and of conformity to the said law and to the whole body [under that law], as has been explained in the preceding chapter.

The difference between the cessation of a law in general, and its cessation in particular.

17. As to the second reason [for doubt—Sect. 4, *supra*], relating to the will of the prince, a reply is easily drawn from our previous remarks. For when the reason for a law ceases in general, the law is rendered useless by that very cessation, and its subject-matter becomes incapable of causing a just obligation; so that the will of the legislator must necessarily cease in consequence, partly because he has willed to impose a binding obligation justly and to such an extent as is licitly possible (no other presumption being acceptable), and partly because, once the subject-matter of the law has changed, he would not be able

to impose such an obligation [through that law], even if he did so will. And if it is assumed (an additional point which was brought up in connexion with this same argument) that when the first reason ceases to exist another reason takes its place, as is ordinarily held to occur in the case of taxes, the reply to this is that the first law has ceased to exist, and no other law has been made. Consequently, if the prince wishes to make the act in question obligatory on the basis of a new reason that arises, it will be necessary for him to legislate anew, or promulgate his wish to this effect; otherwise, and merely by the force of that earlier law alone, his subjects cannot be bound.

As to the third reason [for doubt—Sect. 4, *supra*, p. 422], either this constitutes a proof of the first assertion [Sect. 2, *supra*, p. 420], if, when the extrinsic end of the law ceases to exist, its subject-matter still retains a righteous character and is of itself advantageous for the common good; or else, if this same reason is applied to the occasions when the object of the law ceases absolutely, we deny that it is possible for the law to be obeyed licitly under such circumstances, since such obedience would be a vain and idle action; and even if the act itself could be performed with rectitude, owing to some other and specific benefit sought by the agent, that is too extrinsic and incidental a consideration to result in the perseverance of the original law, which did not impose any obligation to act in that manner or for the sake of that end. Neither can such a non-observance of the law—which has now manifestly and publicly ceased to exist—be attended by moral ills; just as such ills need not be feared in consequence of the non-observance of a law that is manifestly and publicly unjust, from which greater ills would result if, on the contrary, the observance thereof were obligatory.

18. Finally, it is possible to form in accordance with what we have said as to the total cessation of a law, a judgment regarding the cessation of a given part of a law, in so far as that part relates not to a particular person or case but to a whole community.

A law may be rendered useless in regard to one of its parts, and not in regard to another part.

For a law may prescribe many things or comprise various members, and may become useless in regard to one of these factors while it does not become useless in regard to the others. And in such a case, the same judgment applies to this part, whose reason has ceased to exist (provided that it is separable from the remainder of the law), as that which applies to a law in its entirety [when the reason therefor disappears]. For the same argument holds [in the two cases]. In fact, that law, which seems to be a single unit, is actually multiple, and thus it is that one of these various laws ceases to exist without a corresponding cessation of the others. If, on the other hand, a law should embrace many factors in such a way that they were mutually inseparable and that there existed a practically indivisible

obligation, since the good involved [depends on] the whole cause, and evil would result from defect [in the observance of any member[1]—if, I say, the law were of this sort]—it would be necessary to consider carefully the question of whether or not a whole law becomes unjust or useless, or more harmful than beneficial, on account of a defect in one of its parts. If this is the case,[2] the law as a whole will cease to
673 exist. But if, despite that defect, the law remains just, and more beneficial than harmful, it will not cease *ipso facto* before being repealed.

We must also take into consideration the fact that if a law is to cease in an absolute sense, it is necessary that the reason for the law cease in a general sense, permanently. For if that reason seems to lapse thus for a limited time only, then the result will be a suspension of the obligation imposed by the law, rather than the extinction of the law itself; because the latter becomes useless or unjust, not absolutely, but merely for that temporary period. Accordingly, a limited cause [of cessation] produces a limited effect, so that the law is suspended, but not extinguished.

When is a law said to be suspended, but not abolished?

[1] [Suárez is here applying rather loosely the principle that regulates human actions. The morality of an act depends on object, motive, and circumstances. That an act may be good, all three determinants must be not opposed to rectitude. If any one of the three is evil, the act is evil. The principle is enunciated, *Bonum ex integra causa, malum ex quocumque defectu*.—Reviser.]

[2] [A free translation of *& tunc*.—Tr.]

CHAPTERS X–XXVII

Omitted from these *Selections*

FRANCISCO SUÁREZ

A TREATISE ON LAWS AND GOD THE LAWGIVER

BOOK VII

OF UNWRITTEN LAW WHICH IS CALLED CUSTOM

All twenty chapters of this Book are included in these *Selections*

OF UNWRITTEN LAW WHICH IS CALLED CUSTOM

Thus far we have confined our discussion principally to written law. At this point, however, we must turn to a particular study of custom in so far as it embodies law or brings it into being. This order Gregory IX followed in the First Book of the *Decretals*; treating first of constitutions, then of rescripts, and finally of custom. For even if we grant a priority in time to custom over written law, nevertheless it is the more reasonable procedure to take up the written law first, since its matter is more definitely fixed and its field more thoroughly explored.

It is to be added that among human laws those in a written form are earlier than those in an unwritten one, even though many jurists, whose doctrine Rochus Curtius follows in his treatise *De Consuetudine* (at the beginning),[1] assume it as a certainty that consuetudinary law arose first.

For even though men took up a life in common without laws before such were written—as is clear from the *Digest* (I. ii. 2)—it is to be inferred that they held in the place of law, not custom, but rather the personal rule of the king, which is neither law nor custom. This, in fact, is suggested by the language of the *Digest* (*ibid.*), but from the *Institutes* (I. ii, §§ 9–10) it may be inferred that the consuetudinary law was of earlier date among the Lacedemonians than the written law among the Athenians, from whom the civil law took its origin. Whatever may be the truth on this point, it is now clear that custom is often of earlier origin than written law and that frequently it is also more recent.

It is certain, in any case, that the written is the principal form of law, and that from it custom derives in great measure its force and meaning, as is clear from the *Decretals* (Bk. I, tit. iv, chap. xi) and what is there noted. This Book, then, finds its proper place here after what has preceded. In it we have followed the usual arrangement: we shall begin with a definition of custom in the light of its necessary conditions and its causes; we shall then discuss its effects; we shall conclude by treating of its abrogation or alteration.

CHAPTER I

THE DEFINITION OF CUSTOM, USAGE OR GENERAL CONDUCT, PRACTICE OF THE COURT, STYLE, AND HOW EACH DIFFERS FROM WRITTEN LAW

1. Custom, according to Isidore (*Etymologies*, Bk. II, chap. x and Bk. V, chap. iii), is a kind of law instituted by general conduct, which Isidore.

[1] [In the Preface.—Reviser.]

Tertullian.

is accepted as law when law is lacking. He seems to have derived his definition from the passage in Tertullian (*On the Soldier's Chaplet* [Chap. iv]): 'In civil matters custom is accepted as law when the latter is lacking.'

A threefold difficulty with respect to this definition immediately presents itself. First of all, as to the generic classification: for custom would appear to belong rather to the domain of fact than to that of law; it is, then, not a law, but a fact or action frequently repeated. For this reason, Isidore immediately adds [*Etymologies*, Bk. II, chap. x] that custom is called such 'because it is in common usage'. But usage clearly implies not law but fact. And so in controversies as to whether in a certain matter there is or is not a custom, we are wont to say that the question is one of fact, not of law.

The second difficulty arises out of the use of the term *mores* (general conduct): for it would seem to include the thing to be defined in the definition, since *mos* (general conduct) and *consuetudo* (custom), 771 appear to be the same thing, differing only in name. In defining the term *mos* (general conduct) in the same passage (*Etymologies*, *ibid.*; also cited in *Decretum*, Pt. I, dist. 1, cans. iv and v), Isidore says that, '*mos* is *consuetudo*,'[1] and what is astonishing, in the same place, he seems to repeat his error more unmistakably: '*mos* (general conduct)', he says, 'is custom which arises only[2] from general conduct.' Here he includes in his definition not only the thing but the very term to be defined. Again, his statement that '*mos* is custom that arises out of the general conduct of the people only' increases the confusion with the implication that it is possible for custom to be introduced in some other way.

Isidore.

The words 'which is accepted as law', in the second part of his definition, give rise to a third difficulty. They refer, as we shall point out later, not to an essential characteristic of custom itself but to its effect. They seem, also, to convey the opinion that consuetudinary law is not true law, but is reputed as law, and this, too, is false. Other difficulties on this point we shall deal with more conveniently as they arise in the course of the discussion.

Second opinion. 2. The foregoing difficulties have their origin chiefly in the ambiguity of Isidore's terms. Their exact meaning must, therefore, be fixed as a first step to an understanding of the matter of this discussion. We must, then, notice first of all the three terms: *usus*, *mos*, *consuetudo*. All three, it must be noted, are closely kindred in meaning, inasmuch as they are strictly predicated only of free actions. There is, however, some distinction among them.

[1] [This passage in Isidore reads: *Mos est vetustate probata consuetudo* (*Mos* is custom approved by time).—Tr.]

[2] [The Roman edition of Isidore's *Etymologies* by Faustinus Arevolo in a note, Tom. III, p. 192, states that Isidore often uses *tantumdem* for *tantum*.—Reviser.

In its strict theological meaning, *usus* (usage) signifies an act by **Definition of *usus*.** which the will freely carries out that which it elects. This is in accordance with the teaching of St. Thomas through the whole of qu. 16 of I.-II; and with that of Augustine (*De Trinitate*, Bk. X, chap. xi, and *De Diversis Quaestionibus LXXXIII*, Qu. xxx). In these passages, Augustine contends that only a rational animal can properly be said to exercise usage, since only such a being freely applies itself or other beings to action: such application he defines as usage. Consequently, usage is, in strict philosophical terminology, predicated of any act of usage whatever, viewed absolutely, since it is any free exercise of a faculty in the adaptation of means to an end, just as any act of joy in regard to the achievement of the end is called fruition. In the speech of every day, however, usage signifies a repetition of like actions. In this way, as Gregory López notes ([on *Las Siete Partidas*,] Pt. I, tit. ii, law 1 [*glossa* b]), usage is said to grow out of actions repeated without change over a long and uninterrupted course of time. It is for this reason that he contends in his note that usage is a matter of fact, that is, of repeated, free, similar actions with respect to one thing. In the law referred to, on the other hand, usage is said to be that which results or springs from the repeated action. This would imply the possibility of a third meaning of the term, a point we shall take up in a moment.

St. Thomas. Augustine. Gregory López.

3. The term *mos* (general conduct), according to St. Thomas, **Definition of *mos*.** (I.-II, qu. 58, art. 1), is predicated not only of rational but of irrational beings also. For even in Scripture (2 *Machabees*, Chap. xi [, v. 11]) men are spoken of as acting *after* the *manner* of brutes; sometimes in a good sense, as: 'Rushing violently upon the enemy, like lions' (*leonum more*); at times, in a bad one, as in *4 Esdras* (Chap. viii [, v. 29])[1]: 'Those who have lived after the manner of cattle' (*mores pecudum*); at still other times, with an indifferent meaning, as (2 *Machabees*, Chap. x [, v. 6]), '[They had kept the feast of the tabernacles when] they were in the mountains, and in dens like wild beasts' (*more bestiarum*).

St. Thomas. 2 *Mach.* xi.

Nevertheless, as St. Thomas rightly observes (on the *Sentences of Peter Lombard*, Bk. III, dist. xxiii, qu. 1, art. 4), this term *mos* (general conduct) is predicated of brutes only by similitude, or analogy, in so far as they always follow the same manner of acting by instinct; for

St. Thomas.

***mos*, properly so-called is found in free actions only.** *mos* in its proper meaning is found in free actions only. For the characteristic of morality (*genus moris*) begins only where the dominion of the will is found, as the same St. Thomas has said (*ibid.*, Bk. II, dist. xxiv, qu. 3, art. 2). Only the free act, therefore, is properly called moral. The reason is that

St. Thomas.

[1] [*4 Esdras* in the Vulgate, *2 Esdras* in Anglican versions; an apocryphal book, frequently quoted.—Tr.]

the free act alone merits praise or blame, but a 'moral' act is similarly capable of praise or blame.

Aristotle. Consequently, it is stated by Aristotle (*Nicomachean Ethics*, Bk. I, chap. xiii [, § 20]): 'When we speak of a person's moral character (*mores*), we do not say that he is a philosopher or a man of quick appreciation, but that he is gentle or temperate.' *Mos*, therefore, properly so called, is nothing *else* than a frequent repetition of, or continuance in, similar, human moral actions over some length of time. Thus, we say that this or that was done in accordance with general conduct. So, in *St. John*, xix. *St. John* (Chap. xix [, v. 40]) we read, 'as the manner of the Jews is to *Genesis*, l. bury', and in *Genesis* (Chap. l [, v. 3]), 'for this was the manner with bodies that were embalmed'. In the same way those who mutually *Psalms*, lxvii. conform in moral conduct are said to be of one manner (*Psalms*, lxvii [, v. 7]): 'who maketh men of one manner to dwell in a house.'

Whence we may say that the distinction between *mos* (general conduct) and *usus* (usage) is this: the term *usus* may be applied equally to a general habit of action and to single actions; the term *mos*, on the other hand, may not be properly applied to a single action as *usus* may be, but only to a repetition of like actions. Wherefore, if the term *usus* is taken to mean a repetition of acts, it would seem not to differ in sense from the term *mos*. 772

St. Thomas adds in the passage referred to above [on the *Sentences*, Bk. III, dist. xxiii, qu. 1, art. 4] that the term *mos* is used in another sense to signify a tendency to similar actions, that is due to their frequency; this tendency is nothing *else* than a certain *habit*. We might speak of *usus* in the same way, according to the opinion of Alfonso [X] in the law we have cited [*Las Siete Partidas*, Pt. I, tit. ii, law 1]. That law, since it includes several elements, I shall discuss presently.

4. Of custom regarded as factual (as it is stated in *Sext*, Bk. I, tit. iv, chap. i) the same observations may be made. *Consuetudo* (custom) St. Thomas. and *mos* (general conduct)—as St. Thomas remarks in the same passage [on the *Sentences*, *ibid.*]—are practically the same, since both words have the same meaning, namely, frequency of moral actions. For custom, strictly so-called, is found only in free actions, since in necessary actions it is more correct to say that there never is any force of custom, and therefore, it does not exist in brutes, though by analogy it is sometimes attributed to them (*Institutes*, II. i, § 15).

Isidore. Again, custom resides not in single acts, but in the frequency of St. Thomas. them. This Isidore suggests [*Etymologies*, Bk. II, chap. x] and St. Thomas [on the *Sentences*, *ibid.*] very clearly states: 'Custom imports a certain frequency with respect to actions which it is in our power to do or not to do.'

I have noted, however, that this remark applies only to custom factually considered, because we must distinguish two elements in

custom. The one is the frequency of actions, as such, which we may call formal custom. This, as we have said, is matter of fact—as usage is. The other is an after-effect of the repeated acts. This after-effect may be physical, as habit, which is not infrequently called custom but somewhat improperly by jurists, since it has reference to custom as fact. We shall, therefore, include it under the first head. A second after-effect may be one of the moral order, after the manner of a power or a law binding to such action, or nullifying another obligation. This may be called consuetudinary law or a legal rule introduced by custom.

For, just as custom induces a tendency to similar actions and a consequent ease and pleasure in their performance—and this is not only a moral but also a physical effect—which we call habit; so, in like manner, the customary action establishes a moral power or obligation, or, as we shall see later, changes established obligations, by creating not a physical but a moral power or bond which we call law. Thus, just as the word *mos* from meaning a repetition of free actions, has come to signify the habit or inclination itself, so custom, even though its primary reference is to actions as such, has been capable of being transferred to mean a juridical element (which is the result of the repetition of actions) by which it brings into being [now as law, not as physical habit] the repetition of like actions. The term for the cause is wont to be applied to the effect, and vice versa: thus we may apply the word custom either to the frequency of action or to the legal rule created by it.

Here we have the principle of distinction between the words *mos* and *consuetudo* used by Isidore in the passage just quoted [*Etymologies*, *ibid.*]: *mos* refers only to the physical acts; *consuetudo*, however, implies also the element of law. The term *usus* may be employed in the latter sense, according to the third meaning given it in the law referred to above—although it has other meanings. Isidore, however, as may be seen from his comments on this passage, applies the term *usus* only to facts.

5. It is now clear that in discussing the nature of custom, it is necessary to make clear under what aspect we are considering it:

Definition of custom of law and custom of fact. regarded as matter of fact it must be defined in one way; as matter of law, in another. St. Thomas's definition of custom is, as matter of fact, excellent [on the *Sentences*, *ibid.*]: 'Custom is the frequency of free actions all performed in the same way', that is, the frequency of the free use of anything that lies in our power. St. Thomas.

It is to be noted, however, that not every sort of factual custom has the power of creating a legal rule. An evil custom, for instance, creates no legal force; nor does one that grows out of the observance of a law—although it is spoken of as custom. An example of the latter use of the term is found in the Second Chapter of the Gospel according to *St. Luke* (Chap. ii [, v. 27]): '[And when his parents brought in the *St. Luke*, ii.

Acts, xv.

child Jesus] to do for him according to the custom of the law.' This kind of custom is often called *mos*, as in the Fifteenth Chapter [, v. 1] of the *Acts*, circumcision is described as being done 'after the manner of Moses'. There are numerous other like customs which we may pass over as irrelevant to our present discussion.

And therefore, to limit our definition to such custom of fact as is capable of introducing law, we must include in the definition, this term or something equivalent, namely, that custom is a legitimate repetition of actions in consonance with some law; or, that it is one in which all the conditions required by the law are fulfilled, or something 773
to that effect. The definition of Isidore can be said to hold of custom understood in this sense; that is, the word *ius* must be taken, not in its formal, but in its causal[1] sense. If, however, we take into account the intent of Isidore, the context of his definition, and the strict meaning of its words, it is probable that he was not speaking in this sense.

6. Wherefore, even though it is probable that Isidore, in the passages cited [*Etymologies*, Bk. II, chap. x; Bk. V, chap. iii], was considering custom under both its aspects and was speaking in the passage quoted in the *Decretum* (Pt. I, dist. 1, chap. iv), of custom as fact—for speaking thus, *consuetudo* and *mos* are the same; and that it was in this same sense that he said: 'custom is so called because it is in common use'; nevertheless, in the passage cited in the *Decretum* (*ibid.*, chap. v), where he gives the definition we have quoted, he seems to have been considering custom as a juridical element, that is to say, as law itself, which grows out of the factual custom or the repetition of the acts. Thus the way is made clear for solving the difficulties presented at the beginning of this Chapter.

Isidore.

7. To the first of these, indeed, we reply that in custom, two elements are to be found: the factual and the juridical, and therefore, we speak of it at times in one sense, at other times in the other sense. And since in relation to the laws which Isidore is discussing in that last passage, the juridical rather than the factual aspect of custom is more pertinent, he defined it under that aspect and under the category of law. His definition is adapted from the *Digest* (I. iii. 32), in the first part of which we read: 'In matters concerning which we do not use written laws, it is necessary that we preserve what has been introduced by conduct and custom'; and farther on [*ibid.*, § 1]: 'Long continued custom may not unwarrantably be cherished as law, and this kind of law is said to be constituted by general conduct (*mores*).' So also in the law of Spain ([*Las Siete Partidas*,] Pt. I, tit. II, law 1 [law 4]), custom is defined as: 'Unwritten law which has grown out of long and continuous usage.' In the same manner, the jurists define custom under the same category (on rubric of *Digest*, I. iii), and Bartolus (on *Digest*, I.

[1] ['causal,' warranting the introduction of new law through custom.—Tr.]

iii. 32, in his *Lecture* and in *Repetition*, Qu. i), rightly distinguishes the two meanings of the word in almost the same manner in which we have. The phrase *non scriptum* (unwritten) added to the definition by the Spanish law and by many Doctors is virtually included in the statement that this law is established by general conduct (*mores*), which sufficiently distinguishes it from written law. In Chapter Three, I will give this phrase fuller discussion. Bartolus.

8. Hence, the second difficulty is easily resolved: for, juridically considered, custom may correctly be defined as law founded by 'general conduct', since 'general conduct' regards fact and not law: thus, the thing to be defined is not in this case included in the definition; for the consuetudinary law is brought in by the repetition of free acts, and this repetition is called general conduct. So, also, there would be no fault in the logic, if the definition of custom as law were to include the term custom as fact, provided the distinction of meanings with respect to custom is kept clear.

Isidore's sentence that '*mos* is custom which arises from "general conduct" (*mores*) only'[1] has an excellent sense and is faultless, if we remember that the term *mores* is often predicated of single moral acts considered separately [that is, without reference to their being or not being actions done in observance of a custom]. *Mos*, however, as signifying custom is used as a kind of collective term, including the whole number or the repetition of acts. Thus *mos* (a customary mode of conduct), may be said to grow out of *mores* (general conduct), that is, out of free, 'moral' actions.

We may also consider that not any conduct (*mos*) but only the general and public conduct of the community is sufficient for bringing in consuetudinary law—the subject of our discussion—in the sense that it is able to introduce the strict obligation of law. For the private conduct of one person, or of a family, does not found a legal rule—as we shall see later. It is said, therefore, that the custom which suffices to introduce law must be drawn from the general conduct of the people: it must, that is, be so general as to arise out of the conduct of the community as a whole—of all, or the greater part of its members.

Lastly, Isidore adds to his definition the qualifying term 'only' to denote that only that conduct suffices for custom constitutive (if I may use that term) of law, which has come into being by usage alone and general conduct, without the assistance of statute and written law to introduce it. For a general line of conduct that has come into being through law, cannot, as such, bring in law, much as it may help to strengthen law already existing, as we shall point out later. Isidore.

[1] [This appears to be a paraphrase of the same passage in Isidore, *Etymologies* (Bk. II, chap. x, and Bk. V, chap. iii), found near the beginning of this Chapter.—Tr.]

9. As for the third difficulty: we have already stated that although consuetudinary law is an effect of custom as fact, we must keep the two distinct and remember that our present concern is a definition of custom not as fact but as law, and that when the phrase 'which is accepted as law' is added to our definition, the effect of custom is not stated definitely, but its essential quality is explained.

It is said to be 'accepted as law', not because it is not true law, but because Isidore restricts the term *lex* to law in written form only. It is for this reason that he says that consuetudinary law is accepted as written law where the latter is absent.

Bartolus.

774

Bartolus (on *Digest*, I. iii. 32, in *Repetition*, no. 6), states that by this phrase the distinction is drawn between custom and a right (*ius*) which arises from the usage of a single person, or which is not accepted in the place of law, nor is it a regulative right, but rather something that is itself regulated by some law. In order to grasp this point we must recall what has been said at the beginning of this treatise,[1] namely, that the term *ius* has two meanings. According to the one, it signifies a moral power of use: and this is ownership or quasi-ownership; for it may include an established right in holding a thing or a right to have a thing and can be called generally a right of ownership or quasi-ownership. In this sense, *ius* refers rather to fact [than to law]. In the second sense, *ius* is a right that carries the power to bind and command: this we may call the right of law, or legal right. The private usage, then, of a single person can confer a legal right to hold a thing, that is, ownership of a thing, or the right to a servitude (*ius servitutis*) and the like, as is the case in prescription.[2] This kind of right has not the force of law, and so it is correctly held to be not a regulative right, since it neither prescribes nor ordains anything, but rather a regulated right, since it has been acquired by the operation of some law. Custom, however, in the sense of our present discussion, is not of this latter kind, but is a legal right: it is so called because it is accepted as law and because for that law such custom is required as is established by the general conduct of those who employ the custom, that is, the community itself.

The difference between custom and prescription is noted.

10. Therefore, we have briefly indicated the distinction between custom, with which we are concerned, and prescription. The two words are often used as completely synonymous because of their likeness in some details. They are, however, in their proper connotations, radically different.

Bartolus.

Bartolus (*Repetition*, no. 10 to the said question 1, at end), as well

[1] [*Vide supra*, p. 30.—Tr.]

[2] [The right to a servitude, as the right of way, or of retaining ancient lights, is the right which a dominant tenement has established over a servient tenement by prescription or law. This right is the second meaning of *ius*, for it connotes forbearance on the part of others, against whom a prescriptive right has been set up.—Reviser.]

as other earlier commentators whom he cites, makes this point, as do other later writers, such as Panormitanus (*De Consuetudine*,[1] Chap. xi [no. 20]) and Rochus Curtius (*De Consuetudine* [Sect. iii]), with Gloss thereon (on word *legitime*), and Aimone Cravetta (*De Antiquitatibus Temporum*, Pt. IV, at beginning), Balbus (*De Praescriptionibus*, Pt. I, qu. 10), Rochus Curtius (*ibid.*, Sect. v, no. 3) and Covarruvias (on *Sext*, rule *possessor*, Tom. I, pt. II, § 3, no. 2), Matienzo (*Recopilación*, Bk. V, *De Matrimonio*, Tit. VII, law I, gloss 6, no. 3) and Luis de Molina Baetico[2] (*De Hispanorum Primogenitorum Origine et Natura*, Chap. vi, no. 10). The latter, Molina, sets down numerous distinctions on this point; but disregarding them (in detail), the root of the distinction [between custom and prescription] is more clearly perceived from what he says.

Panormitanus.
Rochus Curtius.
Gloss.
Aimone Cravetta.
Balbus.
Rochus Curtius.
Covarruvias.
Matienzo.
Molina.

Because in prescription as well as in unwritten law, there enters an element both of fact and of law, which is introduced by fact; therefore, prescription requires a certain custom, and unwritten law, again, sometimes requires a custom which is in a certain sense prescriptive, that is, one that is indubitable and in accordance with law.

The first difference.

11. They differ, first of all, and chiefly, in the kind of right which each establishes. Prescription, in its strict sense, does not introduce a legal or regulative right, as does law. It confers rather a right of ownership or one of a similar kind to the use or enjoyment of some corporeal thing, as a house, an article of clothing, or an incorporeal right, as the exercise of jurisdiction or the right of suffrage. Therefore, they differ also in the custom of fact by which the one and the other kind of right is introduced; for, the custom which establishes prescription demands conditions different from those which establish law. A custom of the people is essential for legal right; the usage of a private person is sufficient for prescription, unless the object that is to be the matter of prescription is to be acquired by a corporate body. Some of the jurists cited employ the term 'custom' whensoever it is a corporate body that establishes prescriptive right, or whensoever prescription is established against a corporate body. This use of the term is improper. The acquired right is not law but ownership or some right of use. In these cases the community acts as a single private possessor and owner: whether the person establishing prescription or against whom a prescription is established is an actual person or only a fictitious one is an entirely material [—not a formal—] distinction.[3] But we must not quarrel over terms.

[1] [The Latin text incorrectly has: *de Constitutionibus*. It should read: *de Consuetudine* (of custom). This refers to Title IV of Book I of the *Decretals*. Henceforth in Book VII, the commentaries of Panormitanus, Rochus, and other canonists on this Title of the *Decretals* will be referred to as: *De Consuetudine*.—Tr.]

[2] [Not to be confused with Luis Molina (1535–1600), Spanish theologian.—Tr.]

[3] [A material distinction, in the terminology of Suárez, is one that does not affect the main issue. Thus, the distinction between paying a debt with paper money or with coin is only a material or objective distinction. The debt is paid, whatever the medium.—Reviser.]

12. Another difference is that for the validity of a true, legal custom—the subject of this discussion—the consent of the community, or of the prince against whom (as it were) the custom is set up, is necessary; but it is unnecessary in prescription to secure the consent of him against whom the prescriptive right is established, as I have noted elsewhere (Tract. II, *De Religione*, Bk. I, chap. v, no. 19).[1] It is for this reason, [namely,] that for setting up a custom, no legal title is necessary, since consent is sufficient; whereas to establish prescription, a legal title is necessary. This is the doctrine of the Gloss, Abbas [i.e. Panormitanus] (*De Consuetudine*, Chap. xi [, no. 30]) and of others (*De Consuetudine*, Chap. xi). This test is, however, a negative one, that is, it does not give final certainty in this matter: for legal title is often demanded for a prescription, but not always; while for custom, title is never demanded. For this reason, also, in prescription evidence of good faith is necessary; in custom, however, it is not always necessary, at least, not in the beginning.

The second difference.

Gloss. Abbas.

Finally, although in the case of each, some period of time is a775 requisite element, yet it is not the same in each case. In prescription, its length is that which is fixed by law; in custom, on the other hand, either the law does not fix the time necessary for the custom to be set up, or such a fixed period is not *per se* necessary; rather, that period suffices which gives time for the prince or the people to manifest consent—as I shall explain further on. Other differences are set forth by the authorities we have cited, but they lack foundation in reason or are such that their examination need not detain us.

CHAPTER II

DOES CUSTOM ALWAYS INTRODUCE UNWRITTEN LAW, AND IS THE DEFINITION GIVEN COMPLETE?

1. This question is raised by the presence in Isidore's definition of the phrase [in *Etymologies*, Bk. II, chap. x], 'when law is lacking'. He inserted it, evidently, either to make it clear that custom must be unwritten law; or, to point out that we are to assume that there is no written law [against which custom is set up]. Each of these interpretations would seem to be open to doubt. In the first place, because consuetudinary law is often found in written form: the feudal laws and our own Spanish rules of judicial procedure are considered as such. It is not, therefore, of the essence of consuetudinary law that it be unwritten. As to the second interpretation, there is also a doubt for we must notice that custom often derogates from existing law, as will be made clear later: it cannot, then, be true that custom may not suppose the existence

[1] [Not included in these *Selections*.—Tr.]

of written law. From this observation, we see that a third difficulty may be brought forward here, one respecting that other phrase [in Isidore's definition (*ibid.*)], 'which is accepted in the place of law'. For, as a matter of fact, the custom is not accepted in the place of law, but rather abolishes it, so that the custom imposes no obligation to a course of action, but at most does no more than permit it. A fourth objection may be added, namely, that this definition nowhere touches on the element that is of the substance and essence of custom, that is to say, its acceptance by the common consent of the people.

2. I answer, first of all, that the proper meaning and basis of the phrase 'when law is lacking' is that consuetudinary law is commonly introduced in default of law: for where there is already written law, custom calculated to introduce law is not needed; the written law suffices. Indeed, such custom does not seem to be morally possible, since it is of the essence of custom that it be established not by explicit but by tacit consent, as Bartolus notes (on *Digest*, I. iii. 32, in *Repetition*, no. 7) and as is clearly to be seen from the *Institutes* (I. ii, § 9). Thus, if a custom has arisen through the influence of a written law, it lacks for that reason power to introduce law; for it was begun and continued, not that men should be bound by it, but that they should obey some law already in existence. Nor is there any difficulty against our position in the fact that sometimes a custom is said to be introduced subsequently to a law. For this has reference, either to custom of fact only, which does no more than confirm the law; or, to a custom limiting or interpreting the law, and in this respect—as I shall show later—able to create new law. It is thus, it will be noted, not based upon the law, but is an addition to the law.

The true interpretation of the phrase 'when law is lacking'.

Bartolus.

Thus, custom is most properly pronounced to be unwritten law, and is held to be such in the *Digest* (I. iii. 36 and I. i. 6, and in *Institutes*, I. ii, §§ 3 and 9). The reason is that it does not of its nature demand a written instrument, nor does it flow from written law; nor even from the personal or express precept of the superior: it is introduced by usage, for this is embodied not in writing nor in words, but in facts. This is the doctrine of the theologians on certain church laws which have come down by tradition. Of these, we shall have something to say in the two following Chapters.

3. The jurists, however, dispute whether a written instrument is so incompatible with custom that if consuetudinary law be reduced to writing it ceases by that very fact to be such and becomes law of another order. Some have asserted that it does, as Bartolus notes (*ibid.* [, no. 8]), and as Gratian indicates in the *Decretum* (Pt. I, dist. 1, can. v, § *cum itaque*). In that passage, Gratian says that a custom not expressed in writing is properly called a custom, but that one reduced to writing

Bartolus.

Gratian.

Rochus Curtius. Baldus.

becomes a constitution. Rochus Curtius (*De Consuetudine*, in Pref., nos. 5 and 6) and Baldus (on *Digest*, I. iii. 32) concur in this opinion. And Jason says (on *Digest*, XXVIII. vi. 2) that custom reduced to written form by one who lacks the power of making laws persists as custom, despite such written form. The truth of this is clear: this written form is not written law; but it may serve for remembrance and as a source of proof, just as we refer to the Fathers to prove traditions that are unwritten. If, however, custom be reduced to writing by one who has authority to establish law, it ceases to be custom by the very fact that it is so written: it is now written and not unwritten law, and is law not by tacit but by express consent. It may be added that even though the law is written in legal form by one possessing authority to establish laws, nevertheless, if he does not intend, in giving it written form, to add any new force to that of custom, nor to publish or declare it authoritatively as a sufficient custom, it has no more than the force of custom, just as, in the opinion of many, is the case with the laws of judicial procedure. If, on the other hand, the authority fixes the custom in the strict form of written law, and in words that pronounce it binding, it is by that act no longer custom but written law. 776

Bartolus.

4. It appears to me, however, that even in this last situation the custom retains its own force and the essential character of custom unless it be abolished by a special written statute. Bartolus (on *Digest*, I. iii. 32, in *Repetition*, no. 8) was of this opinion, and other jurists frequently speak to the same effect (thereon and on *Digest*, XXVIII. vi. 2), including Antonio de Butrio (on rubric *De Consuetudine*, Chap. xi), and others cited by Rochus (*ibid.*, nos. 5 and 6). This can be proved also from the canon law (*Sext*, Bk. III, tit. IV, chap. ii), where it is said that: 'A custom of this kind is approved by Apostolic authority and demand is made that it be inviolably observed.'

Antonio de Butrio. Rochus.

Gloss.

Such a written law, then, does not abolish the custom which it orders to be observed, rather it adds new force to it; and, as the Gloss on that law observes, from being a particular custom it thus becomes a common law. There is no contradiction in the fact that there should be two founts of obligation—that is, of custom and of written law—for the same thing, any more than that there should be two statutes relating to the same thing. Thus, written laws themselves often cite both customs and statutes as at the same time giving proof of the rectitude of a provision and of the obligation which exists in respect of it. An example of this is the canon law (*Decretals*, Bk. IV, tit. XVIII, chap. iii) which says: '[this doctrine] is approved both by ancient custom and by the laws.'

Nor is the continuance of the custom and of its obligation useless, notwithstanding the existence of a written law on the matter. The reason is that if the custom is a particular one and the supervening written

law is general law—as in the *Decretals* (Bk. IV, tit. III, chap. iii), and if there is effected a derogation from that law by privilege, nevertheless, where the earlier custom existed in that matter, it is not held to have been derogated from by that privilege, unless there is an express derogation from the custom also.

There is here no question of a mere manner of speaking, but it is one of fact, for it may be of the utmost importance as regards moral effect, that a custom which had its beginning without benefit of law should stand as concurrent authority with the statute, and remain in full force as unwritten law; for the mere coexistence of a written law does not make impossible an unwritten law existing with its own peculiar force and in its own terms. The custom should, however, be complete and established with sufficient firmness before the written law comes into being; for if it exists only in inchoate form and the binding force is (as it were) anticipated and introduced by the statute, it will, clearly, be no more than simple written law.

In what manner custom ought to assume the existence of law.

5. To the second objection, that concerning a custom contrary to law—which seems to assume the existence of law—a reply is ready at hand, namely, that it is not against the nature of custom that there be in existence law of some sort on the subject, but only that there be a written law ordaining the very course of action which the custom is to bring in. But a custom which derogates from a law does not suppose a law that regards the same object as the custom, but rather the contrary, namely, that what the law forbade the custom permits—or conversely.

Bartolus.

Bartolus (on *Digest*, I. iii. 32, in *Repetition*, no. 6) explains the phrase 'where law is lacking' in a different manner. He holds, that this phrase denotes that the custom is not to be condemned by the law: for, if the custom is not against the law, the law is clearly defective in respect of the rule which the custom is bringing in; if, on the other hand, the custom is contrary to the law, it should prevail over the law, and thus the latter should cease to exist in order that the custom may prevail. For if a custom of fact is counter to written law and does not remove it, then custom will under no circumstance be able to introduce law. This doctrine is true and ingeniously conceived, but it does not, I believe, express Isidore's thought, which was much simpler, as I have explained in a previous passage. Nor was it necessary to explain this point in detail in a definition, since, in the nature of things, it is clear that a custom could not introduce one legal rule contrary to another already existing, without cancelling it; for the simultaneous existence of two laws in mutual opposition involves a contradiction.

6. There remains the third objection: a custom derogating from

a law already in existence is strictly custom, and is not law. My first reply to this objection is to remark that in the realm of moral actions, under the term 'habit', absence [of action] is understood to be included: thus, Augustine's definition of sin includes not only a word, or act, and the like, [contrary to the law of God,] but also the omission of words or actions in contravention to law. Thus, then, when custom is called law, one is to understand even its power to abrogate law. 777

For one law voiding another is true law, even though it may not prescribe a course of action opposed to that prescribed by the law it has annulled. In the same way, then, a custom abrogating a written law is called unwritten law, since it is accepted as an abrogating law. Whence, it is said that just as permission[1] is included among the effects of law, and as a permissive law is held to be true law—since, even though it does not enjoin the commission of permitted action, it enjoins permission to do it—so custom, introducing law that derogates from statute, does so, indeed, not as imposing an act contrary to the previous law, but only as permitting that act. It thus enjoins permission for the act; that is to say, it forbids that any one be forced to obey the derogated law, or that he be punished for not obeying it.

Isidore. 7. I have recorded a fourth objection, because some have found fault with Isidore's definition as incomplete. Owing to the lack of some such words as 'by consent of the people', or 'by common consent', or, even, 'of the people', they say that the phrase should not be, as it is in Isidore's words, 'established by general conduct' (*mores*), but rather 'established by the general conduct of the people'. This is the opinion of Bartolus (on *Digest*, I. iii. 32, in *Repetition*, no. 6). In fact, he approves in this passage another definition, setting forth, by the addition of several terms, the conditions requisite for custom. Other canonists also object to Isidore's definition as too brief. Not a few offer other definitions. These we need not rehearse, both because they are of no use to us here, and because they are to be found in Hostiensis (*Summa, De Consuetudine*), in Rochus (*De Consuetudine*, Pref. nos. 13, 14), and in the passage of Bartolus (*ibid.*, no. 1 [no. 6]), in which he rejects his earlier opinion and takes his stand on Isidore's definition, just as it is.

The definition of Isidore set forth at the beginning of the treatise is approved.

Bartolus.

Hostiensis.
Rochus.
Bartolus.

It is my opinion, then, that none of those additional terms is necessary: they do not clarify the definition; rather, they obscure it. For, if we add to the definition the words 'the consent of the people', the question arises immediately: 'Of what people?' Is the consent of the council sufficient? The like question arises on each of the other terms.

The words 'established by general conduct' (*mores*) sufficiently

[1] [For *promissio* read *permissio*.—Tr.]

includes the element of consent; since, as I stated before, the general conduct is voluntary. It must be understood, of course, that the general conduct must be such as to suffice for establishing law. What conditions should obtain for this sufficiency, or, upon whose consent those conditions ought to depend, it is neither proper nor necessary to include in the definition. It is enough that the essential and formal character of the thing defined be given in the definition: an enumeration of all its causes is not called for. Such matters are more properly taken up in the course of the discussion.

CHAPTER III

OF THE VARIETIES OF CUSTOM, AND WHETHER IT INCLUDES FORUM AND STYLUS[1]

1. Since custom may be of many sorts, and since our discussion deals not with custom in general but only with that which pertains to human law, and has the force of introducing or of annulling it in some way, a review of the different kinds of custom is called for to clear the way for a discussion of that custom which is our proper concern. Such a review will assist us to a clearer and more precise concept of the nature of custom.

We will give special attention to custom as fact [rather than as law]. From this study we shall see to what extent law can arise from custom; for in this matter it must be noted that the clear understanding of the consuetudinary law depends upon the clear understanding of the fact as the prime cause and root of the law.

2. We may begin by distinguishing two kinds of custom: that which, as its subject-matter, has things or persons, considered separately or together; and that which is concerned with human acts. This distinction is touched upon and illustrated with examples, in [*Las Siete Partidas*,] Pt. III [Pt. I], tit. ii, law 4. Thus, the custom of paying or not paying tithes of the fruits of the field or of the vineyard pertains to things and (as it were) imposes a burden upon them, and the custom of paying or not paying personal tithes or personal taxes pertains to persons; the custom of fasting or praying, however, clearly pertains only to human acts.

The first division of custom: that which has to do with things and persons taken separately or together, and that which has to do with the actions of men.

Some writers maintain, therefore, that the first two kinds of custom—those, namely, relating to things alone, or to persons alone—or both together, pertain rather to prescription than to law, since directly and of themselves they give only an [established] right to hold

[1] [There appears to be an error in this title. No mention of 'forum' or 'stylus' is included in this Chapter. A discussion of these terms is found, *infra*, pp. 476 *et seq.*, Chapter, v, sections 3 *et seq.*—Tr.]

a thing (*ius in re*), or a right to claim a thing (*ius ad rem*), or a right against a person (*ius in personam*), and that this is a kind of moral power, and not law.[1] They argue that even though out of this moral right there arises an obligation in conscience to pay the tithes and the like, that obligation does not arise directly from the custom, but from the law of natural justice, which obliges men to render to others their due. Thus, as a result of prescription, there follows the obligation not to take away the thing obtained by prescription, an obligation which is derived immediately from the natural precept against stealing. And thus, also, from a servitude acquired by prescription allowing passage over a field, there follows, from the same principle, the right that one should not be obstructed in the exercise of the right. The same prin- 778
ciple applies to any custom whatever relating to a thing or to a person.

But a custom concerned with human acts is said to pertain not to prescription but to law. The reason is that no one, as we said in the preceding Book,[2] establishes a prescriptive right concerning his own action, but he can be bound by custom, and by that custom there is established a consuetudinary law with respect to his personal acts.

3. But this doctrine calls for further explanation, chiefly, because there would seem to be *no* custom that is not concerned with human acts, since every custom consists of a frequency of human acts. If you say that all customs consist of acts, but that they are not all concerned with human acts, then the reply would be that if such were the case, there would hardly be any custom which is concerned with human contingencies. For though a custom of fasting be observed by human acts, nevertheless, those actions are concerned both with matters that are the object of temperance, and with that person who does them, whose passions it moderates. This is true of all customs. And if those customs which have to do with the goods of others or with persons distinct from the person observing the custom, are said to be concerned chiefly with things and persons, then it is true, of course, that a prescriptive custom is in a sense concerned with the things of another, since no one establishes a prescriptive right against his own property; and it is also concerned with a person distinct from him who establishes the right. This statement is true for two reasons: because prescriptive custom pertains to the matter of justice, and therefore ought to consist of acts which have regard to another; and because prescriptive right is always established against some person who must necessarily be a person distinct from him who has exercised prescription.

[1] [*Ius in re*, as the right which a worker has to keep the wages he has received. *Ius ad rem*, as the right which a worker has to get his wages. *Ius in personam*, as the right a man has that other people should not impede his free actions. This is a right to claim a forbearance. The right to life is an example, under different aspects, of all three.—Reviser.]

[2] [Not included in these *Selections*.—Tr.]

4. Nevertheless, the division so stated is not satisfactory. First of all, since in prescription properly so called a distinction must be made between the person against whom the prescriptive right is established, and the subject-matter of the prescription. For, in the first aspect, every prescriptive custom is engaged, as is obvious, with a person; in the second, however, it is engaged not only with a thing and a person, but with human facts. Thus, a prince can establish prescription against his vassals that they should render this or that person service, either in war or at his place of residence, or on his lands. A custom of such service or ministry creates a prescriptive right with respect to similar acts, just as the custom of fasting is said to create the obligation of fasting.

The aforesaid explanation is rejected.

And so, in the same way also, a custom which affects another person, and actions and property which are put at the service or use of another, may, without the support of prescription, create law. Thus the pious custom in the Church of making voluntary offerings, of which the *Decretals* (Bk. V, tit. III, chap. xlii) speaks, is concerned with the objects offered as its proximate matter, with God as the person to Whom they are offered, and with the Church or the priests as the persons for whose use they are offered: nevertheless, out of such a custom, concerning such matter and such persons, an obligation in law can arise. In fact the commoner opinion is that it does arise, as may be seen from the text just quoted. And although it is probable that the obligation can be sufficiently explained as a form of prescription, it is nevertheless certain that it can bring in the obligation of a human law, if other conditions are fulfilled. For in the case of a mere custom of private devotion, such as attending a procession on a certain day, or assisting at the divine office without a real obligation[1] so to do, that custom could establish a law enjoining that act. Why, then, cannot the custom of making an offering have the same effect? Finally, on the contrary, not every custom which affects personal action not done in the service of others suffices for establishing a legal rule: the customs of writing, painting, and the like are concerned with facts but they do not suffice to make law.

5. That division of custom, to serve the purpose of our present discussion, should be understood not in a material sense (so to speak) but in a formal one, that is, it should be determined rather by the purpose or scope —as I may call it—of the custom.[2] For one kind of custom would seem to be directed toward establishing right relating to things or between persons: such may properly be said to be con-

How the aforesaid division of custom should be interpreted.

[1] [Real obligation refers to the obligation of beneficed clerics to assist at divine office. If they neglect this duty, they are not entitled to a proportionate part of their income.—Reviser.]

[2] [That is, we should distinguish custom from custom, not on the ground that they differ in regard to material and objective actions, but because their purposes are distinct.—Reviser.]

cerned with things and with persons. It is true that this sort of custom should be regarded as pertaining to prescription and not to unwritten law, which, by a substitution of terms, we are here calling custom. Nor is there any difficulty in the fact that such a custom may at times 779
be engaged with human acts as its proximate matter. And this, either for the reason that in such a case these acts are regarded not as human acts in the sense that freely willed acts are, but as things of such or such worth and value; or, at least, because such a custom is rightly included in that custom which is concerned with persons, since through it the person remains liable and bound—not, however, by custom as law, but by a right affecting the person acquired by another in virtue of the custom, and this right is a prescriptive one. So also, contrariwise, a custom, or rather usage, through which a prescriptive right to an action is wont to be obtained, although it may seem to affect as its proximate matter the action to which a right is obtained by prescription, nevertheless falls directly upon the person who was formerly responsible for the action, and by this quasi-custom he is freed of obligation.

6. The second kind of custom is of its nature classified solely with respect to the usage or non-usage of like acts, as they are exclusively the acts of the agent himself. These acts may be immanent (as it were) as fasting and praying, &c.; or, they may be acts that terminate in an external object, as writing, plowing, and so on, whether they have relation to another person or are free of such a relation. The reason is that all these acts are capable of developing custom because of their very nature, or because of their uprightness without regard to any right acquired through them in respect of another person or thing.

To this sort of custom belongs that which is capable of bringing in a preceptive rule; and in that respect it may be said to be concerned with acts, since it intends by its nature their use or exercise. Customs that concern extrinsic objects and persons must not, however, be excluded from this class. The reason is that through them also a particular obligation of human law may come into being, if they are performed only under that aspect [—that is, as being prescribed—] as the argument concerning the custom that creates obligation proves. Similar examples could be easily adduced.

For the custom of almsgiving can be such as to introduce law, because even though almsgiving is concerned with an extrinsic object and a person distinct from the donor, it can be performed on the ground of pity, and as a good practice of the agent himself, without any relation to any right which another [the recipient] has. The general ground, therefore, would seem to be that such acts, although they have a relation to another, and involve matter extrinsic to the agent, may become obligatory by the mere force of custom—although by them no right is yielded to another—just as they can be commanded by

human law, or, as a man may bind himself to such an act by a vow or by a mere promise. We must add, however, that not every such custom, even though it deals with mere facts, is sufficient to establish unwritten law. Only that custom which is concerned with free actions in so far as they are good or bad relatively to the common good, can do that. For as it is the nature of law either to command or prohibit actions of this sort, so the same nature is necessary for legal custom, if I may so speak. Thus, we exclude such customs as that of writing and the like, which are morally indifferent, private, and of their nature produce only facility or skilful usage in actions of that kind, but impose no obligation of exercise; as custom—of the sort that we are discussing—of its nature does.

7. Secondly, this moral custom [, that is, custom founded on human acts,] can, in its main division, be differentiated into most common, that is, universal; common, that is, public; particular, that is, private. This division is derived in part from the *Digest* (XXX. l. 3), and is more fully set forth by Hostiensis (*Summa, De Consuetudine*, Chap. xi, no. 11), by Baldus, and others cited by Rochus (*De Consuetudine*, in Pref., nos. 20, 21). But they explain the division differently, as may be seen by reference to their works.

The second division of custom: universal and particular.

Hostiensis. Baldus. Rochus.

For my part, however, under the first category [, universal custom], I include, most of all, those customs of the whole world which constitute the *ius gentium*, as I have stated in Book Two.[1] For that *ius gentium* is true law, and in its own order it binds as true [particular] law, as I have there proved. Furthermore, that *ius gentium* is unwritten, a fact that is also obvious. Therefore, it was introduced by the usage and general conduct, not of one or another people, but of the whole world. Hostiensis, therefore, calls it universal, that is, most common custom. Consequently, in passing, we can understand that the definition of custom, given above on the authority of Isidore, is strictly applicable to the *ius gentium*. Nor is this attribution [of being due to custom] contrary to the rectitude of the *ius gentium*, viewed in itself, because the *ius gentium* is truly a kind of custom; and so it has its force not solely in virtue of natural law, as I have proved, nor by virtue of the will of some human prince, as is evident.

Nevertheless, if we restrict the name and character of custom to what we at present are dealing with, namely, civil, that is, human 780
law,[2] as contradistinguished from the *ius gentium*, then, by the name of

[1] [*Supra*, p. 351.—Tr.]

[2] [The difficulty in adequately rendering Suárez's argument here has prompted the following elucidation.

Suárez is proving that custom gives rise to law. However, he restricts custom to that particular kind of custom which is common custom (i.e. civil), not wishing to include universal custom, for he is considering particular laws of particular places. He wishes it understood that he is speaking of human

custom is to be understood only the custom that is common [not universal], which we can call civil custom; and with due proportion, the definition of custom is to be restricted so that by the term law [in the definition of custom] is to be understood human, that is, civil [positive] law, including also canon law. Or else, at all events, this restriction is to be understood as indicated by the phrase *moribus utentium institutum* (instituted by the general conduct of those who employ the custom). The reason is that the said phrase signifies that this kind of law [, due to custom,] should be introduced as new law, either in a particular place or province, that is, introduced as law over and above the common laws of nations, which are considered virtually natural laws. The point can be further explained when we say that the law [introduced by custom] is reputed as law, when written law is wanting, whereas the *ius gentium* is introduced not as though in default of written law, but as being in itself necessary, and whereas also, because of its nature, it postulates that character of necessity, since on no other basis than that of necessity could it be introduced by mankind.

The principle of custom should be restricted for the present purpose so that it excludes the law of nations.

So we shall set aside for the present the first member of our division. Under the head of this sort of custom may be included ecclesiastical traditions whose beginnings and whose author we do not know, but which are observed by the Universal Church, for these embody unwritten law and are strengthened by the practice of the whole Church. For since the Church is essentially universal, for the whole world, these customs may properly be said to be universal, and most generally adopted. On these traditions we shall add in the following sections a few remarks from which it will be seen whether they are to be counted amongst those traditions which are capable of establishing unwritten human law.

In what manner ecclesiastical traditions embody law.

8. Particular, private custom is that which is followed by one person only, or by an imperfect community, a community whose consent is not sufficient to institute law, such as a private household or family, which is unable itself, or through its head, the father of the

By private custom is to be understood[1] that of one person or that of an imperfect community which cannot enact laws.

(civil) law, not of the *ius gentium*, and that it is human law to which he is referring in the phrase *moribus utentium institutum*. His restriction is the more reasonable, because, as he says, a law that is introduced by a general manner of conduct is a new law and is introduced in particular localities, not in all places, as is the *ius gentium*, the latter being a kind of natural law, introduced by and for all mankind in all places. He makes his point still clearer by saying that consuetudinary law arises only in default of positive written statute. This is not true of natural law, because it does not arise and come into being in default of written statutes, but develops because it is essentially necessary. So, too, there is no other way, humanly speaking, for the *ius gentium* to be introduced than by way of necessity, for it applies to and is necessary for all mankind. It could not, therefore, have ever arisen if it merely supplemented particular local laws.—Reviser.]

[1] [The 1612 edition here used has 'not to be understood'.—Tr.]

family, as I have shown in Book One,[1] to make laws. Such private custom we shall not, therefore, count for the present as custom, for the same reason, namely that it cannot establish law.

This is the common teaching of the jurists such as Bartolus (on *Digest*, I. iii. 32, in *Repetition*, no. 6) and Antonio de Butrio (*De Consuetudine*, Chap. xi [, no. 45]) and others. The reason is that if a custom is that of a private person, such a one cannot impose a law upon himself, nor establish an obligation by the mere force of repeated acts, even though the person have a fixed will of acting always in that way. If a promise be added, an obligation arises, not by reason of the custom but by virtue of the promise; and this not by reason of law, but by reason of the fact, that is, of the vow or pact, for on that basis, natural law creates an obligation, as I explained in the treatise on vows.[2] So true is this, that even though the agent may have, in another capacity, the power of making law, he cannot establish it by personal custom, a point which Rochus has noted (*De Consuetudine*, Pref., nos. 16 and 22). The same principle with respect to himself applies to the prince as to a private person, for in his personal actions or in their repetition he acts as a private person, not as prince, nor can he command himself by placing a legal obligation directly on himself as we saw above. So, furthermore, from the private or personal custom of the prince, no consuetudinary law falls upon his subjects. And this, both for the reason that, first, one of the conditions requisite for consuetudinary law is that it be introduced by the tacit consent of the people, and such consent does not intervene, except by the usage and conduct of the people themselves. Without that condition, therefore, the private custom of the prince is insufficient. Again, the subjects are not bound to imitate the prince in their actions, even his most praiseworthy and repeated acts, unless he enjoin it. He does not, however, sufficiently enjoin an action by simply observing a private custom, since thereby there is no express or tacit sign of his will to command it—as is clear. Bartolus has well said (on *Code*, VIII. lii. 2, at the beginning): 'The power of establishing consuetudinary law is given to the prince only when it is yielded by the consent of the people.' Thus, it is clear that personal custom never establishes law.

Bartolus. Antonio de Butrio. Rochus.

9. The same principle holds with respect to the custom of an imperfect community—one family, for instance—since one family is incapable of imposing upon itself an express law, as I demonstrated in Book One, and is, then, much less capable of establishing a tacit law, such as custom is.

Furthermore, although such a community can establish certain private ordinances, which, even though they do not bind as law, do so at least as pacts or mutual agreements; still, the persons of such a

[1] [Chap. vi, § 22; *supra*, p. 88.—Tr.]

[2] [Not included in these *Selections*.—Tr.]

community cannot be even thus bound, it seems clear, on the ground of custom alone, because the pact or the promise is not created by custom alone, unless prescription intervenes, or some law or institution 781
is assumed upon which such consent to the binding power of the pact is founded. For the same reason, although the father of a family can impose a precept within his family, he cannot bind them by his own custom, since personal custom is not a tacit sign of a precept.

10. We are left with the conclusion, therefore, that custom of the second sort only, that which we have called the common, or public custom, is capable of introducing positive human law properly[1] so called. The word custom, in this discussion, has reference to this sort alone. This is the meaning of the term as used by Bartolus (on *Digest*, I. iii. 32, in *Lecture*, no. 4 [in *Repetition*, no. 6]) and Baldus (on *Code*, rubric VIII. lii), Panormitanus, Rochus and all the commentators (*De Consuetudine*, Chap. xi). This is clear both from a sufficient enumeration of its parts, and from our discussion on the definition of custom, the second part of which we shall explain more fully in the following Chapter.

What custom establishes law.

Bartolus. Baldus. Panormitanus. Rochus.

It should, however, be noted that it is one thing for a community to be capable of possessing the power of making laws, another that it should actually possess such power. For only those sovereign commonwealths which have not transferred their jurisdiction to some prince have this power *per se* in respect to their civil laws. The capacity, however, for making laws resides in all perfect communities, that is, cities or peoples, which have the power to be bound by their own laws, whether common or municipal, even though they have a prince over them, since, with his consent at least, they can make laws.

The public custom, therefore, of any community that has the capacity of being bound by its own laws, may establish law, in so far as it rests with the community so to do, even though it may not actually have the power of making laws. It is true that such a custom calls for the fulfilment of more conditions in order to establish law in a community *de facto* lacking that power, than in one that has it, because, for that effect, at least the tacit consent of the prince is necessary, as we shall explain later.

11. We conclude then, at length, that according as the communities are more or less extensive or general, we can distinguish a number of kinds of public custom which are included in the second group of our division. Out of this variety of custom arise a variety and multiplicity in consuetudinary law. For if the community is ecclesiastical, its custom will introduce ecclesiastical law; if lay, it will introduce civil law. Likewise, if the custom be that of the whole Church—to refer to our first division—it will introduce common canon law, concerning

[1] [For *proprius* read *proprii*.—Tr.]

which there are many decrees (in *Decretum*, Pt. I, dist. xi); if that of a whole province, the consuetudinary law will be (as it were) national; if one of a particular bishopric, the law will be (as it were) synodal or diocesan[1]; if that of a private chapter or community, the law will be (as it were) municipal. The same sort of relation will hold true of the civil customs. For if the custom be that of one kingdom, it will be (so to speak) that of the realm, that of a province, or national; if it is the custom of a city, it will be municipal. But common civil law of this order cannot be found apart from the *ius gentium*, since the various realms are not able to be at one in the general conduct of the citizens. And even though the realms are sometimes alike in respect of a certain custom, it is by way not of one entity but of several similar entities, just as in various kingdoms they will have many laws that are alike, but the law of one is not binding on the subjects of any other, nor conversely.

I do not think that praetorian law should be placed in this class, whatever certain jurists may hold—see Rochus (*De Consuetudine*, no. 22)—since the two, consuetudinary law, that is, and praetorian, involve conditions repugnant to each other, as will be clear to any one considering the matter. I shall, therefore, pass it over as scarcely relevant to our subject.

CHAPTER IV

OF A THIRD DIVISION OF CUSTOM: THAT WHICH IS IN ACCORDANCE WITH LAW; THAT WHICH IS OUTSIDE LAW; AND THAT WHICH IS CONTRARY TO LAW: AND OF CERTAIN POINTS OF ECCLESIASTICAL TRADITIONS

1. A third principal division of custom is made under the following heads: that which is according to law; that which is outside the law; that which is contrary to law. This division is that made by Abbas [i.e. Panormitanus] (*De Consuetudine*, Chap. xi, near end), Antonio de Butrio (*ibid.* [Chap. x]), Rochus (*ibid.*, Sect. V, no. 5) and Cardinal[2] (*ibid.*, Qu. 45 [quoted by Rochus, *loc. cit.*]), and is that implied by Hostiensis (*Summa*, *De Consuetudine*, no. 11). This triple comparison may be made in respect of the natural law, of positive divine law, and of human law: thus, in respect of these three kinds of law, there arises a threefold division, each consisting of three members.[3] Of each of these, we shall speak briefly. We shall touch upon them all, in order that, having set aside those matters that are irrelevant to our

Abbas [Panormitanus]. Antonio de Butrio. Rochus. Cardinal. Hostiensis.

[1] [Synodal, because passed in Synod; diocesan, because extended to the diocese, but not to the province.—Reviser.]

[2] [Gratian, Italian canonist, later Cardinal.—Reviser.]

[3] [The complete division is: *Consuetudo iuxta, praeter, contra legem naturalem, legem divinam positivam, legem humanam.*—Reviser.]

discussion, and having briefly treated of those points which are of less difficulty, we may pass on to matters that are germane to the subject and present greater difficulty.

2. With respect, then, to the natural law, it would seem that no 782 moral act can be outside it, at least, in the concrete; for every concrete moral act is—according to the more probable opinion—either good or bad. Such an act must, then, be either in conformity or at variance with the natural law since the natural law is a rule for all human acts. But custom is constituted by concrete human acts. Therefore, every such act must be either in conformity or at variance with the natural law. No custom, then, can be outside that law.

3. Nevertheless, since we speak of the natural law as forbidding certain acts, or as rigorously enjoining the performance of other acts, so we may say that a particular custom is in accord with the natural law, since it proceeds from it, and through it the natural law itself is observed. A custom of an entirely opposite character will be contrary to law, since by it the law is violated—if no more than slightly.

What acts are in accordance with the natural law, and what contrary to it.

A third kind of custom will be outside the natural law when it consists of actions that are, according to a probable opinion, indifferent in the concrete[1]; or of good actions, which, although they are approved by the natural law or enjoined by it as to mode or precise character—that is, if they are done, they should be done in this or that way—are not absolutely enjoined as to performance: they are performed without the command of the natural law.

4. The first sort of custom, then, namely, that according to the natural law, although it may, as is obvious, be excellent, has not that moral effect which is the subject of our present treatment. For it does not introduce new positive law in respect of the same acts, since those acts are done not with such intention or will [of introducing custom]; but rather with the intention of fulfilling the natural law, as we noted above.

Such custom is, of course, useful for adding strength (so to speak) as far as we are concerned, to the natural law, by keeping fresh its memory, and by facilitating its observance on the part of the whole community. Such a custom may at times—if it be approved by prudent, wise, and virtuous men—serve to interpret the law of nature.

A custom contrary to the law of nature is not worthy of the name of custom; it rather merits that given it in the language of the laws—a corruption. It can, therefore, have no effect as law, either by abrogating or introducing law, as St. Thomas teaches (I.-II, qu. 97, art. 3, ad 1) and as is

A custom contrary to the law of nature has no effect.

St. Thomas.

[1] [According to St. Thomas Aquinas there are no human acts which, in the concrete, are neither good nor bad. But the Scotist school maintained that there could be such, as, for example, the picking of a straw from the ground.—Reviser.]

made clear in *Decretals* (Bk. I, tit. IV, chap. XI) and *Decretum* (Pt. I, dist. VIII, can. V and Pt. I, dist. VIII, can. II), together with similar chapters in Distinction viii of the *Decretum*. Moreover, a custom of this kind is said (in *Authentica*, CXXVII, Coll. IX, tit. IX, chap. i = *Novels*, CXXXIV, Chap. i) to derive no cogency from any period of observance, however long. The reason is evident, since the law of nature is, as we have seen, immutable and so cannot be abrogated. Furthermore, such acts contrary to the law of nature have an essentially evil character, and it is inconceivable that they should have obligatory force. These arguments prove not only that no binding law can be introduced through such acts, but also that they cannot abrogate the obligation of the natural law or extinguish any of its precepts, either in whole or in part, since in respect of these, the natural law is, as we saw in Book Two, immutable.

The third kind of custom, that which we spoke of as outside the natural law, may be thought of as composed of actions essentially good or of indifferent actions.

The first kind is true custom, fit by its nature to introduce law, if other elements concur. It is with this custom that we shall principally have to do. But a custom constituted by indifferent actions, regarded in itself and its object, can have no effect on the introduction of law, since indifferent acts, as such, cannot be strictly enjoined. Still, if in them there is found some usefulness essentially good, some law might be introduced through them as custom, or at least, human law abrogated. This point we will explain later when we speak of the effects of custom.

5. The question here arises whether this doctrine holds true of custom with respect to the *ius gentium*. We are not here dealing with a custom in conformity with the *ius gentium*, since it is clear that such a custom is a continuation of universal custom, and is consequently the same law and not a new one. Nor does any difficulty present itself in regard to custom outside that *ius gentium*, for such a custom can be essentially good, and can be capable of establishing law, if no obstacle exists.

A question.

The difficulty arises then with respect to custom contrary to the *ius gentium*: some jurists, among them Panormitanus (*De Consuetudine*, Chap. xi, no. 23) and Rochus (*De Consuetudine*, Sect. V, no. 16), unreservedly deny that it can introduce law. Their denial is grounded on the opinion that the *ius gentium* is truly and strictly the natural law. We, however, have in a previous passage[1] drawn a distinction between the two; and so, when the term *ius gentium* is [, in the light of that distinction,] used in its proper sense, the reason urged [by those authors] is of no value.

Panormitanus.
Rochus.

6. I believe, therefore, that it must be stated that it is not

[1] [*Supra*, pp. 342, 351, 352 *et seq.*—Tr.]

absolutely inconceivable that a part of the *ius gentium* should be abrogated by custom. The reason is that that [act] which is contrary merely to the *ius gentium* as such, is not intrinsically evil, since what is opposed [to such action] is not essentially a matter of obligation of the natural law.

Parts of the *ius gentium* can be abrogated by custom.

Gloss.

The example usually adduced is from the Gloss (on *Digest*, VIII. vi. 14), 783 for it is a rule of the *ius gentium* that no one be deprived of his possessions, even for the public service, without compensation, and still, through custom, a rule might be introduced that possessions may be taken without compensation. Some deny the force of this example, but they do so without good reason; for since custom can establish the mode and conditions of ownership, it can establish the principle that private possessions be held on the condition we have mentioned, and as a kind of servitude to the public welfare. Nevertheless, if the matter be carefully considered, there is here no formal derogation of any law through such custom, but rather a change in the subject-matter of law, just as the same sort of change may be made in the natural law, as I said above, and as appears from the example we gave concerning prescription and the like. Thus, the objections usually brought against our assertion are solved by this one argument.

An example more to our point is that respecting the slavery of prisoners captured in war, a practice that was introduced by the *ius gentium*, and which can be abolished by custom in such a way that in a given province it is no longer permissible, and the same holds true, in my opinion, as to the division of ownership rights. An example may also be offered from the case of the Church; for the Lenten fast of forty days is (as it were) a part of the *ius gentium*, and yet it has been changed in some places by custom, at least partially, with respect to some of the early days of Lent.[1]

7. It should be added that while admitting the possible abrogation through custom of some portion of the *ius gentium*, nevertheless, it is morally impossible that the whole of this law could be abolished, since in that case all nations would have to concur in a custom contrary to the *ius gentium*: which is morally impossible. And this, both for the reason that such uniformity in any matter is hardly found, and especially for the reason that the *ius gentium* is in close harmony with nature. Whatever, then, is contrary thereto is of rare occurrence. It follows from this (a consideration that should be noticed in this matter) that a custom contrary to the *ius gentium* can be approved and tolerated in the case of one people, in such fashion that it does not result in serious harm or prejudice to another people. Thus, if in some territory, passage over highways were permitted only under irksome conditions,

Morally speaking, the *ius gentium* cannot be abolished as a whole.

[1] [That is, the Monday and Tuesday before Ash Wednesday.—Reviser.]

such a custom could not extend to foreigners who in their territory allow such passage without such conditions, save in the case of a toll levied for a just cause, and one applying equally to strangers. Under those circumstances, such a custom would no longer be contrary to the *ius gentium*. But it would be otherwise, if the just cause for this condition should cease to exist. For then it would be contrary to the natural law to extend such a custom to foreigners, because it would be opposed to that law to deprive of their rights by the law of that custom the persons who were obliged to obey it, since they do not come within the jurisdiction of those who could rightfully introduce such a custom.

8.[1] But from the foregoing may be drawn an objection to the solution just given. Thus, a prince may not enact anything contrary to the *ius gentium*, because his power and jurisdiction are inferior thereto—as Baldus states (*Libros Feudorum*: Tit. *De Nat. Feud.*, Chap. i and Tit. *Qui Feudum Dare Possunt*, Chap. i, last section), in which he is followed by Jason (on *Digest*, XLIII. xii. 2, in *Repetition*, no. 3); therefore, neither can the custom of one nation derogate from the *ius gentium*, because the custom is not more powerful than the law of a prince.

Baldus.
Jason.

A reply to this may be made, first, by a denial of the inference for the reason that the joint consent of the people and of their prince to the custom can be of more weight than the consent of the prince by which he enacts law. For it is probable that the prince might not be able to compel his subjects to accept a rule contrary to the *ius gentium*, and still that rule could be established by common consent and custom.

Secondly, I maintain that a prince may, perhaps, enact a law contrary to the *ius gentium* by derogating from it in some matter which it is expedient not to observe in his realm and relatively to his subjects, as, for example, he might enact a law that in his realm there should be no slaves, but that all men should be free, or something similar. For this exercise of power is not opposed to [natural] reason, nor to the proper government of the state. Hence, just as a prince might enact law against another custom, so also he might make a rule contrary to that portion of the *ius gentium* which affects his government; and the reason is that, because of its universality alone, the *ius gentium* is not there the stronger or more immutable with respect to his subjects: it is so only with respect to other nations.

9. In the second place, the third division set forth above is to be applied also to the positive divine law: for some customs are in accordance with it, others are outside it, and still others, contrary to it.

With respect to the first group, that custom is said to be in accordance with the divine law which includes the observance of a certain body of divine positive law, that is strictly preceptive. For, if the term law in this case be given a broader interpretation so as to include the counsels

[1] [Section-number missing in Latin text.—Tr.]

[of perfection], then we may say that a custom in accordance with the counsels may be held to be according to the divine law. Nay more, every morally good custom to which Christ gave specific approval can be said to be in accordance with the divine law; and in this sense, no such custom can be outside that law. For the present, however, we shall call 784
every custom made up of acts in accordance with the divine law, yet not prescribed thereby, a custom outside that law; therefore, a custom by which a divine precept is fulfilled, we shall call a custom in accordance with that law.

Under this latter heading, then, certain unwritten traditions of the Church would seem most properly to belong. For when the divine law as to baptism, or the Eucharist and the like, has been put into written form, any custom in accordance therewith is not part of the unwritten law, as is evident from the foregoing, since such a custom has the written law for its source, and it initiates nothing new in law. Hence, though this may sometimes be called a custom or *mos* (general way of acting), as is evident from *St. Luke* (Chap. ii [, v. 27]) and *Acts* (Chap. vi [, v. 14] and Chap. xv [, v. 1]), it is to be understood as custom of fact, and an observance of some written law, and not as a distinct law in itself. The unwritten traditions of the Church can belong to this class.

St. Luke, ii. Acts.

10. Nevertheless, at the outset we must note that, strictly speaking, tradition and custom are different things. Tradition relating to general conduct—and it is of this tradition that we are here speaking—is evidently the first institution of some action or of a mode of acting; or it may be understood as meaning a body of doctrine through which such an institution is given or made known to men. Custom, on the other hand, which embodies the tradition, is the fulfilment, and (as it were) the preservation of the original tradition. Hence, tradition may be written or unwritten, but custom exists as usage, and so is unwritten. Thus, St. Paul said (*2 Thessalonians*, Chap. ii [, v. 14]): 'hold the traditions which you have learned, whether by word or by our epistle'; that is, whether orally only or in writing; and thus he assumes that both kinds of tradition exist. When he says 'hold', he commands the usage and the execution, wherein consists the custom. The same is to be gathered from the passage in the *First Epistle to the Corinthians* (Chap. xi [, v. 23]): 'For I have received of the Lord that which also I delivered unto you'; that is, by word first, and later, in writing, by his epistle. He indicates usage and custom when he adds [*ibid.*, v. 33], 'Wherefore [. . .] when you come together to eat' &c. Thus, Tertullian also, in Chapter iii of his work *On the Soldier's Chaplet*: 'If no Scripture has determined this [tradition], certainly custom has corroborated it, and the custom, without doubt, originated in tradition'; and he adds in the next Chapter: 'There is offered you tradition to authorize it, custom to

Tradition and custom are not the same.

St. Paul.

Tertullian.

confirm it, and faith to live it.' Therefore, he distinguishes custom from tradition, so much so, indeed, as to say: 'How can a practice be observed which has not been handed down by tradition?'

11. But on this point it is further to be noted that just as custom sometimes emanates from the written divine law, so it could have emanated from and have taken its rise from the same law in unwritten form. For as written form is not, as we said above, of the essence of law as such, it is much less of the essence of divine law. Indeed, New Law, of its nature, as we shall show in Book Ten,[1] demands no more than an oral form, and was thus handed down in the beginning, as is evident from various passages in Paul. It is most certain that there are now many unwritten traditions of the Church which emanated from a divine command, and which embody such commands, as may be gathered from the Council of Trent (Session IV). The same will appear in the treatise relating to the Sacraments and to Faith, on which we shall have to speak at length,[1] and is also clear from the learned chapters of Bellarmine in *De Verbo Dei* (Bk. IV [, chaps. v *et seq.*]).

Bellarmine.

However, such are not truly customs of law, but customs of fact; since, although they contain unwritten law, they are not laws established by custom; rather, the custom emanated from divine law. Hence, such law is not human, but divine; and the traditions themselves are called divine, even though they have been preserved by custom. Such custom added no new element to their binding power as law, although it has the highest value for the interpretation of the law: for as custom manifests the divine precept, so, too, it sets forth (so to speak) the mode of observance, that is, the conditions of its fulfilment.

I note, in passing, that besides these traditions, there are other unwritten traditions, which are believed to have originated not from divine, but from Apostolic precepts and laws: the law, for instance, of the Lenten fast, and of the observance of the Lord's Day, and the like—which are called Apostolic traditions. The custom of observing these traditions can be styled Apostolic law. This is not consuetudinary law, since the custom did not initiate the law, but the reverse; and so these are customs—in the sense that we are using the word here—not of law, but of fact.

What customs emanate from Apostolic precepts.

But at times, a custom of the Church, although observed universally, could have originated without the aid of any express precept, written or oral, whether of divine or of Apostolic origin, as seems likely in the case of certain sacramental[2] ceremonies. Here we find custom existing

Sometimes an ecclesiastical custom may originate apart from any precept.

[1] [Not included in these *Selections*.—Tr.]

[2] [Suárez means that certain ceremonies came into existence by custom, and the Church sanctioned them, so that they became what are called 'Sacramentals', such as blessing with holy water, blessing the fire, ringing the church bells.—Reviser.]

without any binding tradition, but not altogether without tradition. For the very initiation of a custom by the Apostles, and approval by the first pastors of the Church, gave to a practice the force of tradition. Thus, Augustine said (*On Baptism*, Bk. IV, chap. xxiv): 'What the 785
Universal Church holds, and has always held, even though it be not defined by the Councils, is most properly believed to have been handed down by Apostolic authority.' The reason is that these immemorial customs, if they are observed by the Universal Church, are believed to have had their beginning in the days of the Apostles, and that, not independently of their teaching and their authority, at least by way of approval.

12. The second kind of ecclesiastical custom, namely, that which is outside divine law, may now be easily explained. For such in general is every custom which, on the one hand, has not proceeded from, nor is, on the other, contrary to a divine precept. But this is not enough to warrant the inclusion of such custom with that which embodies unwritten law, unless it be added that it came from no express law, Apostolic or human, as I have said a little above,[1] as is clear from our discussion on the definition of custom; and as we shall soon repeat in dealing with human law. But if a custom is outside divine law, and took its rise from no express law, then it is of itself sufficient for establishing unwritten consuetudinary law by the tacit consent of the people, and of prelates, or princes.

What ecclesiastical custom is there outside divine law?

Such are those traditions which the Universal Church observes, yet which are not expressly commanded by Christ our Lord or by the Apostles; as, for example, lay communion under one kind, infant baptism, etc. But it must be noted that universal ecclesiastical customs of this kind do not always establish unwritten law that obliges their adoption, or observance as [legal] custom: as, for instance, making the sign of the cross on the forehead, or prayer towards the East—which Tertullian (*On the Soldier's Chaplet*, Chap. iv) and Basil (*De Spiritu Sancto*, Chap. xxvii, which is cited in *Decretum*, Pt. I, dist. xi, can. v), and others whom I cited in another passage include under such traditions. They also put forward as examples of this sort of tradition, customs which do not bind under precept. Such traditions, for all that, do establish a sort of law, or rather, indicate one that approves (as it were) of such acts. For such a custom of the Universal Church, although it is not a matter of special obligation, in respect of some particular usage, still does impose the obligation of believing that such a usage is licit and holy. It does so, both because the usage is always regarded as having Apostolic approval, and because the authority of the whole Church guarantees it [to be licit and holy], since the Universal

Tertullian. Basil.

[1] [*Supra*, this Chapter, § 9.—Tr.]

Church cannot err in morals by following a sinful practice or by approving it.

13. There can, finally, exist a custom contrary to the divine law, a custom which the Scripture calls, in a disapproving sense, the 'tradition of men' (*Matthew*, Chap. xv [, v. 3]): 'Why do you also transgress the commandment of God for your tradition?'; and, that which is referred to in *Mark*, Chap. vi [Chap. vii, v. 8]: '[leaving the commandment of God, you hold] the tradition of men.' Hence, Paul said (*Colossians*, Chap. ii [, v. 8]): 'Beware lest any man cheat you [by philosophy, and vain deceit;] according to the tradition of men [. . . and not according to Christ]'. These traditions, too, St. Peter (*1 St. Peter*, Chap. i [, v. 18]) called vain. Custom of this kind cannot, therefore, have the moral effect of law, and so it in no way concerns us. For it is impossible that such custom should abrogate a divine law. This is the doctrine of St. Thomas, as we saw (I.-II, qu. 97, art. 3, ad 1), and that of Panormitanus, with the Gloss, and others (*De Consuetudine*, chap. xi).

A custom contrary to divine law is of no effect.

Matthew, xv. *Mark*, vi [vii]. *Colossians*, ii. St. Thomas. Panormitanus. Gloss.

And the reason is that even though the matter of such a law be not intrinsically evil, but evil only because it is prohibited, and as such not essentially impossible of initiation by custom; still, because the prohibition is a divine one, men cannot prevail against it, since men cannot change the divine law or the divine will. Nor can God be thought of as conniving at such custom and abolishing the law because of it, as we shall see later that men may do [in the case of human law]. There is no principle or ground for imputing such a possibility to the divine will; nor would it be expedient, or befitting the divine authority; His law must be immutable, as we shall see later when we come to deal with the law of grace.[1]

Some, however, of the jurists to whom we have referred, assert that custom can have the effect of limiting and relaxing (as it were) the divine law if a reasonable cause exists. This must not be taken as meaning a limitation or dispensation properly so called, which has for its effect a partial abrogation of the obligation of a previously existing law. In this sense, the assertion is clearly false. The reason that holds good in respect of the entire law, holds equally good for any part thereof, in due proportion, as we shall state at greater length (Book Ten).[1] Therefore, this [apparent limitation and relaxation of the law] should be looked upon rather as a kind of interpretation of the law; for custom may thus interpret even the divine law, which in such a case, and because of such an intervening cause, is not binding, because it was not framed for such a situation.

A custom in respect of divine law can be its interpreter.

14. It remains for us to apply the same third division[2] to human

[1] [Not included in these *Selections*.—Tr.] [2] [i.e. of custom, *vide supra*, p. 463.—Tr.]

law, for it is with that law we have chiefly to deal, and because in such law it happens more commonly that a custom may be in harmony with, outside of, or contrary to law. Indeed, there is no dispute concerning these two latter groups, nor need we add any special remarks about them here, since the main discussion regarding them will be found in the following Chapters. But concerning the first group, some jurists contend that no custom can exist which is in accordance with human law. This was held by Felinus (on *Decretals*, Bk. I, tit. III, chap. i, no. 17), by Antonio de Butrio thereon, as well as Giovanni da Legnano and Dominicus de Sancto Geminiano (on *Sext*, Bk. I, tit. II). Others, however, to whom I have previously referred, who propound this third division, hold the opposite opinion, for they advance it particularly with respect to human law. The difference of opinion is not actual, since the latter group are speaking of custom of fact, while the former are speaking of custom of law. It is clear that there are customs of fact in accordance with human laws, as the custom of hearing mass on feast days, or of going to confession during Lent, and the like. Thus, human law is like the divine or the natural law, in that there may exist a repetition of actions in conformity with it—in short, a custom of fact.

On custom which is in accord with, outside, and contrary to human law.

786

Felinus.

Antonio de Butrio.

Giovanni da Legnano.

Dominicus de Sancto Geminiano.

Custom in observance of human law is one of fact.

15. Nevertheless, it is certain that no new unwritten or consuetudinary law is introduced by means of such a custom, and the aforesaid authors are speaking in this sense when they say that even though a people obey a law for a thousand years, they do not thereby introduce custom [, i.e. consuetudinary law]. The reason is touched upon above: such custom of fact is merely a form of observance of a pre-existing law; and so it does not tend to the introduction of any new law, since the custom was formed or continued not for that purpose, but only to fulfil a law already in existence.

Nor does the prince [, in tacitly accepting such a custom of fact,] form a new purpose of introducing another legal rule relating to that matter, since he is merely continuing (as it were) the intent that was always in his mind, that his law should be observed. Wherefore, Baldus truly says (on *Code*, VIII. lii. 3 [in commentary, Sect. 3, *Leges*]) that a custom in harmony with law is not regulative in character but is imitative of the law, or executory as it were. From which the Gloss (on *Sext*, Bk. I, tit. IV, chap. i) and Panormitanus (*De Consuetudine*, Chap. xi, no. 21) correctly infer that if that law be abrogated by a later one, the custom [that grew out of its observance] is abolished also, even if no mention is made of it. The reason is that it does not add any new obligation, and it is held to be established, not on its own merits, but as something annexed to and founded upon the law; and so it has no binding force when the law which forms its basis is abolished.

Baldus.

Gloss.

Panormitanus.

Whether, when it existed as a custom first, and later a written law was established, the custom can persist after the revocation of the written law, is a point we have touched upon in a previous Chapter. The reader may consult Felinus (on *Decretals*, Bk. I, tit. III, chap. i, last rule to no. 15, particularly limit. 7) and Rochus (*De Consuetudine*, Sect. 5, no. 7), for further study of this question.

Felinus.

Rochus.

16. But even though this custom does not introduce law, it may have some influence on pre-existing law as regards its preservation and future effects. In this sense, it is said first of all, to confirm the law. Thus, Gratian (in *Decretum*, Pt. I, dist. IV, can. iii) held that: 'Laws are established when they are promulgated; confirmed when they are approved by the general conduct of those who use them.' The same is made clear in the *Code* (VIII. lii. 3). And Bartolus (on *Digest*, I. iii. 32, in *Repetition*, no. 4) explains the matter well when he says that 'such custom confirms the law not directly, but by removing that which would prevent[1] the law from exerting its efficacy, namely, the contrary custom and the abrogation of the law'. So, in almost the same way, this sort of custom may be said to render aid to the law, as may be gathered from the *Decretals* (Bk. II, tit. XXXIX, chap. xiv), since the custom makes easier the observance of the law, and in a certain sense, makes the law itself less liable to change, as we have just explained.

What effects the aforesaid custom has.

Gratian.

Bartolus.

Another effect of this custom is to interpret the law; indeed, it is called in the canon law (*Decretals*, Bk. I, tit. IV, chap. viii) and in the civil law (*Digest*, I. iii. 37): 'an excellent interpreter of the law'. Bartolus (on *Digest*, I. iii. 32, in *Repetition*, nos. 4 and 5) and Panormitanus (*De Consuetudine*, Chap. viii, no. 28 [no. 7]) speak of it in the same way. The reason is that it indicates in what sense the law was originally made and received. But if at any time this custom induces such an interpretation as to introduce some change from the first form of the law, the custom will then be something more than a mere interpretation, and will, in that respect, be a custom not in accordance with the law, but one that is superadded to it. On this point, the same principle applies as in custom contrary to the law, since the custom introducing change is in some respect in opposition to the law as it was at first, for it is said to derogate from that law in some particular. We shall, then, treat of it with regard to this effect at the same time that we deal with custom that abrogates law.

17. Finally, it is usual to speak of another effect of this kind of custom, which is called the extension of law. Thus if, for example, a law is made originally for laymen only, and then through custom

[1] [The term *removens prohibens* means, literally, removing an obstacle. For example, if I cut a string which is holding up a weight, the weight will fall. The string prevented it from falling. My action removed the obstacle to the fall of the weight. My act was *removens prohibens*, or a cause *per accidens* of the fall of the weight.—REVISER.]

comes to be observed by clerics, it may happen that by reason of custom it will bind clerics also, who would otherwise not be bound by the force of the law itself. This may be gathered from Panormitanus through his comment (on *Decretals*, Bk. II, tit. XXVII, chap. viii, no. 4), Felinus (on *Decretals*, Bk. I, tit. II, chap. x, no. 62 [no. 65]), Covarruvias (on *Decretals*, Bk. IV, *De Matrimoniis*, Pt. II, chap. vi, § 10, no. 18 [no. 35]), and Tiraqueau (*De Iure Primogenitorum*, Qu. 44), who hold that a just custom, one common to clergy and laity, binds clerics; and that, therefore, *a fortiori* a custom of the clergy will bind the clergy, even if that custom is established in accordance with a law for laymen.

Panormitanus. Felinus. Covarruvias. Tiraqueau. 787

But on this point it must be remembered that a custom according to law in the sense that it exists by force of law and by its command, is one thing; and that a custom according to law in the sense that it is modelled on the law, and is like to and imitates it, is another matter. Here we understand the term 'custom according to law' in the first sense. Such custom does not really extend law except, possibly, by way of the interpretation that it may give to the words of the law. Nor, in the above example, does custom accord with law in that [, i.e. the first] sense, since it proceeds not from the civil law, but from the free will of those who have wished to perform what the civil law prescribed, even if they were not bound thereby—which was the case of the clerics in our example. Hence it may be said that that custom—of the clerics—was according to the civil law only by imitation; it is not, therefore, strange that it should introduce new law. For custom has this force *per se* according to the *Code* (VIII. lii. 3); and the fact that it is an imitation of another and extrinsic law is of no importance, nor does it take from the custom its force. Hence it is that this custom is not properly an extension of the prior law, but the establishment of new law of another order or jurisdiction. For the obligation which arises concerning such persons comes really not from the force of the prior civil law, but from a new ecclesiastical law introduced by custom of the clergy. That kind of custom, as such, is thus shown to be of the type which is outside the law.

CHAPTER V

OF THE VARIOUS DIVISIONS OF CUSTOM ON THE BASIS OF SUBJECT-MATTER

1. Customs may, in a fourth way, be grouped on the basis of the things or subject-matter with which they are concerned, and on this principle a number of subdivisions, or easier classifications, can be included in custom. Thus, custom

Custom is either canonical or civil.

may be distinguished as canonical or civil, just as written law is divided into similar branches. For if a custom relate to spiritual matters, it will be canonical, as the custom of fasting, or that of the observance of a feast-day. And in general, every custom, proper to the clerical order as such, is canonical, even when it might sometimes seem to be concerned with secular matter; for it always touches upon such matter as affecting the property of churches, or the property or persons of clerics, and under this aspect it is sacred or spiritual. But a civil custom is one that is proper to laymen, and is rightly concerned with subject-matter that is temporal. For it resembles civil law, as may be seen from the reasoning of the *Code* (VIII. lii. 3).

2. One may object that this division is not an adequate one, because there are customs observed in common by the clerics and the laity and binding upon both orders—as we saw from Panormitanus and other writers in the preceding Chapter—and such a custom must be called not canonical or civil, but mixed. To this I reply first, that such a custom includes clerics merely in their character as citizens, as its subject-matter pertains to temporal government and to the common welfare of the state. As such it is a civil custom: partly, since it tends wholly towards a temporal end and falls within secular authority; partly also, because it emanates from the state as a human organization; whence the law or custom will be termed a civil one. Nor is there any unfitness in the fact that such a custom should bind clerics as citizens, because they are included in the term state (*cives*), as Bartolus (on *Digest*, L. i) and Panormitanus (on *Decretals*, Bk. II, tit. XXVII, chap. viii) note. And, again, they may be bound by the written civil law, in respect of its directive force, as has been previously explained. Custom may, on the other hand, relate to clerics as such or simply as Christians, in which case the custom is essentially a canonical one. The reason is, that only a canonical custom can bind clerics as such, and only such a custom is of that higher order of custom which can include laymen also; for custom always follows the principle of written law and [therefore] depends upon a power and jurisdiction of the same order [as law].

Panormitanus. Bartolus. Panormitanus.

Customs may be canonical in two ways. In the first place, the subject-matter and object of a spiritual custom may relate to clerics and to laymen as Christians, and such a custom makes no distinction between the two orders and is canonical: as the custom of observing a feast-day is common to both. A custom may be canonical, in the second place, solely on account of some propriety or likeness; as, for example, for the reason that in a certain locality both civil and ecclesiastical judges observe the same custom in their decisions. Thus, strictly speaking, we have here not a single custom, but two, one canonical and the other civil, which are regarded as one merely by a combination of 788

the two. Thus, our division is an adequate one; and, in passing, we have said all that is necessary in exposition of it. It will also be of service in our use of terms in the following discussion.

3. Custom may, again, on the basis of its subject-matter be divided into general conduct (*mos*), strictly so called; and style (*stylus*), rite (*ritus*), and forum (*forus*). This division will become clear from our explanation of the last three terms, for we include under these words every other custom not comprehended under general conduct (*mos*), strictly so called.

In the first place, then, style means some special usage of writing or speaking, as may be inferred from the *Decretals* (Bk. V, tit. xx, chap. vi), where, for determining what are genuine Papal rescripts, it is said that, among other matters, style must be taken into consideration. Some hold, from that passage, that the term in question means [in law] only a customary manner of writing, for this is the meaning given the term in the *Decretals* (Bk. II, tit. xxx, chap. viii). This is the opinion of Rochus Curtius, also (*De Consuetudine*, Preface, no. 28 [no. 27]), and of others whom he cites. The translation of the word, too, favours this definition; for its primary meaning apparently is a bronze instrument for writing; the word was then applied to the writing itself (*Code*, I. ii. 1); and thence to the fashion or arrangement of the writing. But even though the term is so used in the above-cited laws, that fact does not exclude other meanings, for it also signifies a 'usage' or manner of speaking. Thence also the word would seem to have served to signify a certain usual mode to be followed in judicial procedure. Thus Cynus (*on Code*, VIII. lii (liii). 1 [2, no. 7]) said that style is the practice of some court, and Baldus holds the same (on *Code*, *ibid.*, 3). By a substitution of terms the practice of the Roman curia is thus usually called its style. And what Bartolus says (on *Digest*, I. 1. iii. 32, in *Repetition*, no. 10, at end of qu. 1), on this matter is almost of the same import, namely, that style is a custom which relates to a method of speaking or proceeding—that is, in court. On this account, Bartolus says (on *Code*, VIII. lii (liii). 2, no. 9) that style may be established only by the judicial acts of those whose business lies in the courts. Angelus de Ubaldis (on *Institutes*, I. ii, § 9), however, insists that style has the same meaning with reference to legal decisions as it has in other matters. This is certainly true in the general meaning of the word, but when we consider its use in connexion with the explanation or the introduction of law, it seems to mean properly a certain order in the drawing up of judicial decisions; including thereunder all [legal] documents, bulls, and rescripts. For even if in executing them, judicial procedure does not intervene, yet their style is considered in judicial decisions. Many points relating to this word have been collected with erudition by Cristóbal de Paz

The meaning of style.

Rochus.

Cynus.

Baldus.

Bartolus.

Bartolus.

Angelus de Ubaldis.

Cristóbal de Paz.

in his writings on the laws of Spain (on *Las Siete Partidas*, Pt. I [, nos. 34–40]) which are called styles.

4. So, not to linger upon the mere meaning of the word, and to come to the matter as it pertains to law, we can distinguish—as we have done in the case of custom—two kinds, style of fact and style of law.

What is style of fact?

To my mind, style of fact is not so much the frequency of the actions of writing, speaking, or proceeding, in a certain way, as that quasi-conventional form which is wont to be kept in the order of speaking, writing, or procedure, so that in the different parts, there will be used such and such words, or that the parts will be arranged according to a certain method or order. This meaning is evident from general usage, and from the laws cited; and may also be inferred from the *Code* (I. ii. 1), where it says: 'The style of the last will must be free'[1]; that is, the form of making testamentary disposition of property. The reference here is clearly to style as matter of fact and means not frequency of actions, but the form followed in drawing up such a document. The term is also more clearly used in the same sense in the *Code* (X. x. 3). So, too, Terence in *The Lady of Andros* [Prologue, line 12] said: 'But there is a difference in the sentiment and the style.' But since it is especially in speaking or writing that such a form is customarily employed, the usage itself, or the custom of speaking and writing in this manner, is termed style. And so style signifies a custom as fact, and in this meaning it was used by Baldus (on *Code*, I. ii. 1 and IX. xlix. 7). But this view must be understood to apply not absolutely to every custom, but only to custom in matters of the kind to which I referred above.

Terence.

Baldus.

5. If, then, there arises from such a style of fact an obligation to observe such a method or order in passing judgment or in procedure, 789 then in this respect style will be a special and unwritten law. Whence, since it does not seem ordinarily possible that this obligation can be introduced through style as fact in such wise as to have the force of law, except in those things which concern judicial matters, style would seem specifically as an element of law to be restricted to a customary order in court proceedings, as we said in citing Bartolus. For in other matters, utterances, or writings, a usage of speaking or writing according to such and such a mode, would seem to have too little relation to the common good to make it possible for the said usage to establish law. But in judicial matters it may be of great importance, so much so, as Ancharano remarked (*Consilia*, 53), that the style of the court makes law in cases where there has been no legal decision.

Bartolus.

Ancharano.

Accordingly style, as a thing properly termed judicial, relates to judicial procedure. Hence, style is a certain kind of unwritten law, which sometimes creates a positive obligation, allowing no departure

[1] [This quotation, as given by Suárez, varies slightly from the text of the *Code*.—Tr.]

therefrom, according to the *Code* (IX. xxxv. 11); at other times, it abolishes an obligation in such a way that, although by the general law a decision should be handed down by the court, yet because of the style of the court, this is held to be unnecessary. Upon still other occasions, style establishes an interpretation of the law, even an authentic one, such as must be followed. In what manner style may be introduced, so as to have those effects, must be explained in its due relation to custom, and wherever it possesses any special peculiarity, that will be pointed out in the course of our discussion.

Various effects of style are touched upon.

6. Thus, at length, we can understand what the laws of style are, and what is their nature. When a law is said to be a law of style, the term may be understood in two ways. One way is that this denomination be derived from the object of the law, that is, the subject-matter with which the law is concerned. Such a law of itself does not, properly, pertain to custom, but rather to written law, which arranges for the style to be observed in judicial procedure, just as the rhetorical rules that are given, for the orderly arrangement of the matter, for the dignity, clarity, and grace of written or spoken compositions, may be called the laws of style. Of such sort are the laws of style of the Spanish Kingdom, in which the style of conduct or custom is frequently cited. So, I am of the opinion that this denomination was derived from the subject-matter itself, although Cristóbal de Paz (on *Las Siete Partidas*, Pt. I, no. 53 [no. 73]), explains this rubric [on style] otherwise. A law of style may, in a second way, take its name from the intrinsic mode whereby it has been introduced through usage alone in such forensic or judicial subject-matter, and so is properly unwritten law, and a form of custom, as has been explained.

What are the laws of style and what is their nature?

Cristóbal de Paz.

Rochus.

7. The second member of our division is rite (*ritus*). For Rochus Curtius places it among those matters which relate to custom, when he says (*De Consuetudine*, Pref., no. 28) cited from Panormitanus (on *Decretals*, Bk. I, tit. xi, chap. ix): 'Rite is a custom that gives solemnity in the performance of some action; so that when usage provides for the solemnity of an action, it may be called rite or observance.' His only reference in support of his definition is to a passage (*De Consuetudine*, Chap. xi) in which no particular mention of rite is made. According to this description, even style may be a form of rite, although not every rite may be called a style. Panormitanus (on *Decretals*, Bk. III, tit. xxx, chap. xxxii) gives it a more restricted meaning: 'Rite signifies general conduct in spiritual matters.' According to this definition, not every solemnity of action may be called a rite, but only that expressed in sacred matters, as in sacrifice, the Sacraments, and the sacramentals; or in prayers, or in the

The meaning of rite.

Panormitanus.

Panormitanus.

divine offices. This seems to be the general ecclesiastical usage of the word. Indeed, Panormitanus never proved that the word signified a species of custom; for, on the contrary, he said (on *Decretals*, Bk. I, tit. xv [tit. xvi, chap. iii]): 'Rite is a certain form and solemnity in an action relating chiefly to the sacramental act.'

Panormitanus.

8. Accordingly, the doctrine that we have set forth concerning style should, it would seem, be applied also to rite. For a rite may be factual, or legal. Likewise, rite of fact, primarily and of itself, consists in a certain solemnity or ceremony in some action. In the three Chapters of the *Decretals* cited, it is used with this meaning. Whence neither custom nor frequency of actions are of themselves necessary for rite of this sort: for more commonly it is introduced prior to any kind of usage, either by word, as when Christ our Lord instituted the essential rite of the Sacraments; or, again, by writing, as is clear in many of the accessory solemnities and sacred observances instituted by the Church. But it is not intrinsically impossible, and in fact it often happens, that a rite of this sort should be introduced by usage and custom. Such a custom may be, therefore, spoken of as a certain rite, and this is the meaning of the authors quoted above. But it will be necessary to distinguish between the rite as fact, and the rite as law. For in the first aspect, it is a repetition of actions in a certain manner and in a certain matter; in the latter, it may be an unwritten law with respect to that matter, which has been initiated by
790 that repetition. Thus, almost all canonical customs in actions concerning the divine worship, in so far as they give to those actions a form, or special mode, may be called rites. What, however, is the nature of that law, and how it is introduced, must be determined from the general rules concerning custom. For there is no peculiarity in this kind of observance, such that it cannot be treated of, under the principles that apply to custom.

Rite of fact and of law.

9. A third branch of custom in this general classification is 'forum'. This term is not commonly used in this sense in the general law, and so Bartolus, Panormitanus, and Rochus, and other writers on custom make no mention of it. But in the laws of our kingdom, Spain, forum is reckoned among the customs (*Las Siete Partidas*, Pt. I, tit. ii, law 7), as Gregory López notes [*glosea* n], in commenting on that law.

What is forum?

Bartolus. Panormitanus. Rochus.[1]

Gregory López.

When the derivation of this word is considered, it would seem to mean the same, or almost the same, as style in the sense in which we have explained that term. For in popular usage, forum usually means a public place set apart for trafficking and the business of selling, and is so used by Isidore (*Etymologies*, Bk. XV, chap. vi). And, it is because courts are usually held in such public places that Isidore believes that

Isidore.

[1] [For *Lockus* read *Rochus*.—Tr.]

the name has been transferred to mean the place of judgment. The term 'forum', he says (*Etymologies*, Bk. XV, chap. ii and Bk. XVIII, chap. xv) signifies a place for conducting litigations; and the word is said to have been derived from the verb *fari* (to speak). This derivation is contained in the *Decretals* (Bk. V, tit. xl, chap. x). Hence, the word also means the special domain of each judge or prelate, in which sense it seems to be used in the *Decretals* (Bk. II, tit. ii), as Hostiensis, Panormitanus, and others have noted in commenting on that title. Hence, also, by an extension of meaning, judicial actions are wont to be called 'forensic actions'—as they are in the *Digest* (II. xii. 9). So also, public documents are termed 'forensic instruments' and these are accepted as proof in the court, as may be seen in the *Code* (IV. xxi. 20, § 2). So, then, customs relating to the order of judicial procedure are called forensic customs.

Hostiensis. Panormitanus.

10. In Spain, then, these customs are held to be included under the name of forum; for the laws which are spoken of as those of the forum, take their origin from usage, as is said in the preface to the collection of those laws. There is also no doubt that in such matters usage may initiate law; there is no reason for doubting that custom can establish law in that matter, any more than in other matters. Hence it is said in the *Digest* (XL. vii. 21): 'We ought to follow the custom of those who are handling the matter.' Elsewhere the *Digest* (L. xiii. 1, § 10), expressly states: 'High regard is to be cherished for a custom of the Court.' Bartolus makes a note of the same tenor (on *Digest*, I. iii. 32).

Bartolus.

In what manner forum and style differ.

In this sense, then, it is evident that forum differs only slightly from style, and thus, although in the laws of Spain those of forum and style are distinct, still the latter are held to be quasi-interpretative of those of the forum, as is stated in the rubric on the laws of the forum. Nevertheless, forum and style are distinct. My ground for this statement is that forum does not, as is the case with style, signify an order or mode in the use of words, or in procedure, but apparently designates all the laws that are competent by reason of judicial authority, or have a relation to it and its usage. Therefore, the whole body of laws relating to the use of judicial authority can, apparently, be designated by the name of forum, the name being taken in a collective sense, although even individual laws of this sort are usually called *fora*—in Spanish, *fueros*.

Whether forum includes written and unwritten laws without distinction.

11. For these reasons, some writers maintain that in this acceptation, forum signifies not custom alone but both written and unwritten laws indifferently—the latter being those introduced by custom in relation to matters of jurisdiction and judicial procedure.

This opinion was held by Burgos de Paz (Law 1, *Tauri.*,[1] No. 385):

[1] [Marcus Salon de Pace, *Ad Leges Taurinas insignes Commentarii* (Pinciae, 1567).—Reviser.]

'for the laws of the forum are written, yet they are properly comprehended under the name of forum'. But the more common opinion of Spanish jurists is that these rules are not of legal validity, save by force of custom, so that a written law of forum has no legal force, nor sufficiency as proof, unless its usage has been proved. This is the teaching of Gregory López (on *Las Siete Partidas*, Pt. I, tit. ii, law 7 and Pt. VII, tit. xv, law 28), of Suárez[1] (*Proœmium Fori*, Nos. 1, 2, and 3), of Diego Valdés in *Additions*[2]; of Cristóbal de Paz (in rubric to law on style, Pt. I, no. 36), and others on *Tauri.*, Law 1 (which is law 3 of tit. i, Bk. II of *Compilación*), from which the same conclusion is drawn.

Gregory López. Suárez. Valdés. Cristóbal de Paz.

But if this is true, then certainly the laws of the forum, as written laws, are not legal prescriptions. For a written law does not derive its essence and force from usage, but from enactment and promulgation. These laws, however, were not instituted or proposed as in themselves binding, but only in so far as their usage was manifest. They are, then, mere registers of custom, and frequently their rules—despite their written form—are to be classified as unwritten and consuetudinary. That they exist in written form is not incompatible with this character, as we pointed out before.

12. But whatever may be true of these special laws of forum, there
791 is no doubt that there could have been written laws relating to the whole body of forensic business, and again, that others could have been introduced by custom; and so, all that we have said as to factual style, or about written or unwritten law, may, in due proportion, be applied to forum. We may also add that, even though in the Kingdom of Castile the forensic laws were limited to the subject-matter of judicial procedure, it is possible that in the other kingdoms, as in Aragon, &c., they were interpreted in another manner and with a wider meaning.

13. For, in those places, the forum would seem to be the name given to the ancient laws of those kingdoms, which are peculiar to them and which had been confirmed by (as it were) inviolable usage, especially those which pertained to the mode of government and of the exercise of jurisdiction of the prince, and of [the manner of] subjection of people and nobles. It is possible that they included other matters also; and it is not clear to me whether they owed their origin to express institution, or were introduced by custom. For they might have had their origin in either manner, if, as we assume, they are just and reasonable. With the exception, therefore, of these special terms or customs, all other laws introduced by usage, in whatever moral matter, retain the general name of custom. Thus, it becomes clear that

[1] [This is Rodrigo Suárez; sometimes spelled Juárez or Xuárez, a Spanish jurist of the 15th century.—Tr.]

[2] [D. Jacobus Valdés, *In Comment. ad proœmium fori Roderici Xuárez, Additiones.*—Reviser.]

this classification multiplies consuetudinary law not formally (as it were) but only materially; that is, with respect to the things or the subject-matter with which law is concerned. The same is true of other like groupings which could easily be thought out.

14. Lastly, we must note another division of custom: into positive, and privative or negative custom, a division which may be useful in our later discussion. The former takes its origin from positive usage and consists, in so far as it is a custom of fact, in a certain repetition of actions, and therefore, as law, it sets up a disposition or an obligation to act. The latter sort, on the other hand, is passive in character and originates from non-usage, and so it is sometimes named [negative custom]. To the extent that this non-usage is frequent and continuous, it possesses the character of a custom, which consists (as it were) of fact; and where it establishes some legal rule, it merely fosters a disposition or obligation to refrain from action. But, at this point, we must mark the distinction between negative and privative non-usage, a distinction which we shall more fully explain in our discussion of privilege.

Division of custom into positive and negative.

Negative non-usage does not establish custom—as Paul de Castro rightly noted (on *Digest*, I. iii. 32)—because it is not an action, nor a moral omission, and so does not possess the character of a moral and voluntary usage, without which the introduction of custom is not possible.

But privative non-usage which is continuous, or repeated upon due occasions, does establish moral custom for quite the opposite reason. The chief reason here is that such non-usage cannot practically exist without a positive act in the sense that theologians use the term in discussing acts of omission. This [quasi-positive act in non-usage] may happen in two ways. In the first, because non-usage consists in the absence of some proper circumstance, or of some formality in a positive action; for example, the contracting of an incestuous marriage without a dispensation. For on account of its frequent occurrence, many conclude with Navarrus that this is a true custom which might have abolished that impediment [to marriage]. This sort of custom must be called not merely negative, but positive, since it consists not in a simple omission but in the performance of an action implying a negation [of the law]; nor would the mere negation suffice to establish custom without the action. It may, again, happen that the non-usage consists in the mere absence of action at a due time; as the omission to hear mass, despite the law, on a certain day. For such a custom to establish law, this omission must be voluntary, and at least in that respect it involves an action [of the will]; but formally, it consists in the absence of due action, and thus the custom is called privative.

Such a custom can also be called desuetude, although this term

may be ambiguous, as is observed by Rochus Curtius (*De Consuetudine*, Pref., nos. 30 and 31), since desuetude in its proper meaning seems to assume the [previous] existence of custom: for it is because it recedes from custom that it is termed desuetude, whether the recession be by means of contrary actions, and so through a custom positively contrary in character, or whether the recession occurs solely through the omission of an ancient usage. It may, it is clear, occur in either way. Rochus.

Thus, desuetude may occur through contrary custom. A negative custom may also exist, but it is not desuetude, if it does not assume the existence of a contrary custom. Desuetude can, indeed, be said to exist even without any regard to actual previous custom, but only to one that might or should have come into being. This apparently is the meaning in which the jurisconsult Julianus uses the term in the passage cited in the *Digest* (I. iii. 32 [, § 1], at end). In this sense, desuetude consists formally in the absence of due actions and thus, properly, it
792 signifies a negative or privative custom. So for the sake of clearness we shall use the term in this sense. As to how it may possess the moral force and effect of custom, we shall see in the discussion that follows.

CHAPTER VI

WHAT IS A GOOD AND REASONABLE CUSTOM AND WHAT IS AN EVIL AND UNREASONABLE ONE

1. This is another possible division of custom and one which we must make in order to explain the moral nature and the effects of custom. I have thought, then, that a discussion of it should be taken up at this point. A twofold division, however, is suggested by the title: one into the good and bad, the other into reasonable and unreasonable. These divisions are not synonymous; the second implies an element not included in the first. We must, then, take up each division separately.

2. When, then, custom is divided into good and bad, we must take the words in the sense of moral goodness and rectitude, and of the evil contrary thereto. The reason is that other sorts of goodness, regarded in themselves, or of evil contrary only to them, do not render men or their customs either good or bad. We are here considering custom solely in its moral aspect, and as it is able to constitute or annul some rule of human conduct. Accordingly, no third group, such as indifferent custom, is added here. Such a custom, according to the more probable opinion, is either not possible in usage and practice, as is more likely, or, even if such be admitted, it is, viewed as indifferent custom, irrelevant for setting up law, unless it

Good and bad customs.

is converted to some kind of rectitude, in a way presently to be explained.

Hence, we see that this division of custom is concerned with custom of fact; for legal custom cannot be of an evil character, or opposed to rectitude, since this very evil would be in contradiction with the nature of law. For, just as a statute if it is evil is no true statute, so also, an evil law is no law; and therefore, an evil custom can exist only in fact and can never establish a legal rule, unless the element of evil is taken away.

A bad custom can be only one in fact, never in law.

Our present division is, then, based upon custom as a fact common and public in some community. Thus, this division is of itself sufficiently clear, first with respect to the existence of both members, since just as individual persons may follow good or evil customs, so may a whole people or community; secondly, with respect to its sufficiency as we have already explained; and, finally, with respect to the distinction between the members, a distinction which is evident from the terms themselves.

3. In order, however, that we may explain more fully the meaning of this distinction and difference in its parts, I note, further, that a custom can be good in two ways: in one, it can be good in so far as its object is alone concerned; in the other, it can also be good from the character of the agent and from the circumstances of the morally good actions by which the custom is introduced. In this latter meaning custom is called good in the absolute sense; in the former it is so only under one aspect—that is, objectively—if the other requisite conditions are lacking.[1] The reason is that absolute good arises only when all elements [in an act] are good, and therefore a custom to be absolutely good must be brought into being through acts good in every respect; for a custom to be good only objectively, however, it is sufficient that it be concerned with an object good of its nature, that is, either with acts which are in their object good or with those which could be performed with moral rectitude, and done from a just motive.

A good custom is of a twofold character.

In a similar—even if not exactly the same—way a subdivision of bad custom may be made. For, since evil is the result of a defect of any kind at all,[2] so through whatsoever element a custom is bad, it can be called so absolutely. Nevertheless, one custom may be evil in view of the object of the actions which by their frequency constitute the custom, that is, because they are evil in virtue of their object.

Another custom, on the other hand, may be concerned with subject-matter not evil in itself, and nevertheless be, in another aspect, evil in respect of the agent, or of some other circumstance, or condition which precludes goodness. When, then, custom is intrinsically and from its object evil, it deserves not the name of custom, but of abuse or corruption, as is said in the case of laws. For such a custom is not capable of establishing true law, nor is it possible that through it a customary act can become good or not evil. But if the custom be at least objectively good, or not evil, although it may have been introduced not in a praiseworthy way, but through evil actions on the part of the agent, it nevertheless retains something of the character of a good custom, and from that aspect it is not inconsistent that it may preserve or establish some rule of unwritten law.

[1] [That is, an act is morally good absolutely if object, motive and circumstances are good: it is good only under one aspect, if the object alone is good, but motive and circumstances not so. —Revised.] [2] [A reference to the teaching on the moral act: *Bonum ex integra causa, malum ex quocumque defectu.* An act is good, if all its determinants are good. It is bad, if any one determinant is bad. The determinants are: object, motive, circumstances.—Revised.]

4. For a clear exposition of the foregoing, I add the further observation that it is possible for a certain custom to be bad of its nature, because the actions constituting it are either intrinsically evil, or because they are, as prohibited actions, so evil that they cannot be made good actions by any human power. Such a custom is properly called an evil custom by reason of its object. It is certain that this sort of custom cannot
793 introduce law, since it is opposed to either the natural or the divine law, of which we have treated before.

A custom intrinsically evil establishes no law.

In another way, however, an action or the subject-matter of a custom can be evil merely because it has been forbidden by human law. It cannot be said of such a custom that it is simply no custom, and of no moment, as will be evident from what will be said immediately, and from the discussions in the subsequent Chapters. The following rule is applicable to this sort of custom, namely: 'Many actions are forbidden to be done, but once done, they are valid.' The reason is that this kind of custom is not essentially evil, nor does it contain evil from which it cannot be separated by human power and will; and so, while in its inception the custom is bad, it can lack evil in fact, if the evil at last ceases, or if human prohibition is withdrawn. Thus, such a custom is absolutely and without qualification evil not by reason of its subject-matter when viewed in itself, but only by reason of the presence of a human prohibition, and in virtue thereof. There is, therefore, no radical impossibility of its introducing law.

The same will be all the more true, if the actions through which a custom is established are neither evil in themselves, nor even forbidden by human law, but are done with some evil circumstance on the part of the agents. But since such a circumstance may be separable from the action, the custom may be valid as to the substance of the action, but not as to its circumstances; just as we have said elsewhere concerning a vow. Thus, if there be a custom of celebrating some feast by means of unfitting sports, or by bull-fighting, such a

custom is not truly binding in respect of the manner of the celebration, but can be so regarding the observance of the feast. This is the principle we must go on, unless it is in some way made clearly certain that it was not the will and consent of the people to bind themselves otherwise [than as to the manner of celebration]—for, as we shall state below, a custom cannot be introduced without consent. In this case, that circumstance [, unfitting sports, &c.,] may be said to be of the substance of the custom, and in consequence, the custom is bad intrinsically, owing both to its object on account of the said disorderly nature thereof and to its essential connexion with the action [of celebrating the feast in such a way]—at least from the main intention of the agents.

5. Now we must give our attention to a difficulty raised with respect to the other member of our division, the one which distinguishes customs as reasonable or unreasonable. For it is not quite clear whether these two sorts of custom are the same as the other two which we have enumerated; nor is it clear by what rule they are to be distinguished both from one another and from those others.

Reasonable and unreasonable custom.

Navarrus.

The Doctors experience difficulty on this point and express various opinions. First, Navarrus (*De Alienatione Rerum Ecclesiasticarum ac De Spoliis Clericorum*, Sect. 14) defines that as a reasonable custom, 'which is not directly or indirectly contrary to natural or divine law'; and conversely, 'every custom which is directly or indirectly opposed to natural or divine law and such custom only' is unreasonable. To say that a custom is contrary to the natural or the divine law is to say that it is evil by reason of its object or subject-matter, as is evident from what we have set down in a previous paragraph. Moreover, Navarrus proves his proposition. He cites, first, the authority of Augustine (*Letters*, cxviii, Chap. ii [*Letters*, liv, Chap. ii, in Migne ed.]) to the effect that: 'what is proved to be neither contrary to Catholic faith, nor opposed to good morals, is to be treated as indifferent'. In the second place, he says that that which is in conflict with natural or divine law cannot be established by custom; and conversely, that whatever is not so opposed, may be established thereby; and therefore Navarrus concludes that the first of these is unreasonable custom, and the latter, reasonable.

Augustine.

The inference is clear, since evidently no custom can prevail unless it is reasonable, and no custom can be denied introduction save an unreasonable one. The proof of his antecedent is that whatever may be established through human law can be established by a custom; and, conversely, that what may not be introduced by custom cannot be introduced through human law. Human law, however, can establish whatever is not in conflict with natural or divine law, but not what is repugnant to them—according to the reasoning of the *Decretum* (Pt. II, causa xxvii, qu. i [qu. ii, can. xix]), the *Constitutions* of Clement (Bk. II, tit. xi, chap. ii). Therefore, Navarrus repeats this same opinion elsewhere (*Consilia*, Bk. III, *De Censibus* [, cons. vii]), saying that a custom is not unreasonable, unless it is opposed to natural or divine law. This is also the opinion of Gerson (*Alphabetum Divini Amoris*, Pt. III, lxii, letter P),[1] and *Supplement* to Gabriel (*on the Sentences*, Bk. IV, dist. xlii, qu. 1, art. 3, doubt 6 [sole qu. conclus. 9, doubt 6]).

Navarrus. Gerson. Gabriel.

6. Other writers, however, state the matter otherwise, and say that every bad custom, because it is contrary to law—whether natural, divine, or human—is unreasonable. Whence, they hold, on the contrary, that that custom is reasonable, which is good at least in respect of the action itself, and is of a subject-matter not prohibited, whatever may be the extrinsic and accidental evil it may take on from the agent. In support of this position the Gloss (on *Decretals*, Bk. I, tit. iv, chap. xi, word *rationabilis*) is cited, to this effect: 'I call that reasonable which is not disapproved by the laws.' This is more clearly stated in another Gloss (*ibid.*, chap. iii, word *canonicis*): 'A custom opposed to a canonical ordinance is not valid'; and this seems to take its force from the text of the *Decretals* itself (Bk. I, tit. iv, chap. iii), wherein it is stated that a certain custom is said to be not reasonable, since it is 'in conflict with canonical ordinances'. The conclusion is that it is sufficient that a custom be bad for the reason that it is forbidden by the ecclesiastical law, for it to be held unreasonable. This is the tenor of the *Decretals* (Bk. II, tit. xxvi, chap. xii), inasmuch as that Chapter decrees that 'nothing can be obtained by prescription which is contrary to obedience'.

Gloss. Gloss.

794

Many other similar laws are cited by the aforesaid Glosses. This position can be confirmed by reason, on the ground that a just law is reasonable; and that, therefore, a custom opposed thereto is unreasonable; therefore, every custom which is evil, either from the nature of the object, or from the fact that it is forbidden by divine or human law, will be unreasonable: conversely, every custom not so forbidden will be reasonable.

7. Nevertheless, my first reply in refutation of the opinion thus set forth is as follows: that the distinction between reasonable and unreasonable customs is not to be found in the fact that they are or are not forbidden by natural or divine law; nor to be found in goodness or evil which they possess by virtue of their object, or subject-matter. The proof is that, although every usage contrary to divine or natural law is unreasonable, yet it is not such custom only that is unreasonable—as I shall make clear by two proofs.

First reply in refutation of the preceding opinion.

[1] [The reference is to Gerson, *Sermo coram Rege Francie, 7ª consideratio*, and *Tractatus de Potestate Ecclesiastica et de Origine Juris et Legum, consideratio 10*, may be found in Vol. IV *Gersonis Opera Omnia* (Antwerp, 1706).—Reviser.]

The first is that, if we speak of usage regarded in its relation to the initiation of consuetudinary law, then a certain usage or custom might be wholly good in fact, and still be unreasonable in its relation to the initiation of law; and this, not because it is deficient in goodness, but rather because (so to speak) it is excessive. But such a custom is not contrary to natural or divine law, either directly or indirectly. Therefore, . . .

The major premiss is evident from the example of a custom observed by a whole people of hearing Mass daily, an act of the greatest rectitude; but if this custom were observed with the intention of establishing law, it would be in that respect imprudent, and on that account the custom could be termed unreasonable. The same is true of like customs. This reason, however, is not convincing, because it is not the custom that is unreasonable, but the intention of initiating obligation through it, or in regard to it rather is unreasonable, and as such may be said to be contrary to natural law. Similarly, a positive law enjoining that practice would not be unreasonable in respect of its subject-matter considered in itself; but the law itself would be so, and as such would be opposed to natural reason and prudence.

Now if, on this ground, this subject-matter may be termed unreasonable—not because it is evil, but because it is lacking in fitness for a general law—so, on the same ground, it is contrary to natural reason, which dictates that not all good actions are to be the matter of human law. The same principle applies, in due proportion, to the obligation induced tacitly by custom and explicitly by law.

On this ground alone, then, it is proved that a consuetudinary law can be unreasonable, and therefore void, even though the custom in itself is not unreasonable, a very true statement; just as it is possible for a law to be bad, although the action directed by the law may not be bad. Nevertheless, the argument would seem to be a sufficient refutation of Navarrus' thesis [in *Consilia*, Bk. III, *De Censibus*, Consil. vii], both because it demolishes the basis of his argument, as I shall presently show, and again because he[1] seems to think that a custom is not unreasonable in relation to the initiation of law, save in so far as it is directly or indirectly opposed to divine or natural law in the actions that constitute it, or in the fact itself of the custom, as Navarrus pointed out in the basis of his argument.

Navarrus.

8. Secondly, however, that opinion of Navarrus is more clearly refuted by the fact that many customs, not contrary to divine or natural law, are held to be unreasonable in the field of law. And they are unreasonable not only in relation to the establishment of law on account of an excess of goodness, but

Second refutation.

[1] [Reading *tlie* for *illa*, though *illa* might stand in spite of its being strange to say that an opinion can think; *illa . . . videtur sentire*.—Reviser.]

absolutely and in themselves, on account of some defect or irregular quality which, although it does not attain to that quality of evil [which would make it intrinsically unreasonable], is sufficient to constitute the custom a truly unreasonable one: therefore, in order that a custom be accounted reasonable it is not sufficient that there be that twofold negation, nor that it be good, or [at least] not evil, so far as its object is concerned.

A proof of the antecedent of my argument is derived from the custom of not obeying in all its details a general interdict laid upon a place, a custom that is discussed in the *Decretals* (Bk. I, tit. iv, chap. v), and which is there called unreasonable, although it contains nothing opposed to natural or divine law. Abbas [, i.e. Panormitanus] (*De Consuetudine*, Chap. v, no. 3 [no. 2]) makes the observation that every custom that is contrary to what is good is unreasonable, and this is in accord with the *Decretals* (Bk. III, tit. i, chap. xii). He understands, however, by the contrary of what is good—that is, what is fitting—those actions which do not always include something opposed to divine or natural law; as, for example, that laymen should be seated in choir with the clergy. This is not contrary to divine or natural law, yet it is not fitting, and it is, therefore, impossible for this practice to be introduced by a custom. The canonists hold the same thing with regard to the custom of clerics engaging in hunting for the sake of pleasure, as does Giovanni d'Andrea (on *Decretals*, Bk. V, tit. xxiv, chap. ii). Rochus (*De Consuetudine*, Chap. xi, no. 30) refers to a number of such instances.

Giovanni d'Andrea. Rochus.

Yet Navarrus would say that these and similar acts are indirectly opposed to law, either natural or divine. But this solution is not satisfactory. First, because it is impossible to define adequately in what that indirect contrariety consists, since the act can exist in its totality without any violation of law, natural or divine; again, because a deed forbidden by human law appears to be all the more indirectly contrary to the natural law, since the natural law enjoins obedience to superiors, and yet Navarrus admits that the custom in question is not either directly or indirectly against divine or natural law; and, finally, because there is the fact that the custom is not evil from its matter or its object but is, for all that, held to be unreasonable.

Navarrus.

795

Navarrus.

9. And now, the first principle of Navarrus's argument can be turned against him, for it is not true to say that human law can command whatever is not opposed to divine or natural law. For although it cannot enjoin the performance of anything in conflict with these laws, it does not follow that it is able to prescribe everything not in opposition to them—as has been stated above. This is clear from a consideration of the works of the counsels [of perfection]; or, of those good actions which are not compatible with the counsels, such as marriage; and (which is more to the

Navarrus's argument turned against him.

point) of those actions which are less proper or less decorous—though they are not contrary to the said law—as in the case of a law prescribing the playing of games which are somewhat unseemly or not expedient, even if they are not bad; or a law granting to clerics some way of acting or some habit not sufficiently upright, and the like. Therefore, human laws can be unreasonable, even if they are not evil, on the ground that they permit actions forbidden by divine or natural law. So, too, the same can be true in the case of customs.

10. Then, in reply to those who hold the second opinion,[1] I observe that for a custom to be unreasonable, it is not sufficient that it should be opposed to the canon law, nor is this opposition always necessary [for the custom to be so]. Panormitanus and almost all the other commentators (*De Consuetudine*, Chap. xi, no. 5) are of this opinion, including Bartolus (on *Digest*, I. iii. 32 and on *Code*, VIII. lii. 2). I shall refer in a moment to the opinion of certain other writers also.

For a custom to be unreasonable it is not necessary that it be contrary to the canon law.

Panormitanus.

Bartolus.

The first part of this assertion is proved from the fact that an unreasonable custom cannot prevail in opposition to human law, as is clear from the *Decretals* (Bk. I, tit. IV, chap. xi); and yet, as I shall prove below, it is possible that a custom contrary to human law can prevail against that law. Therefore, not every custom which is in conflict with human law can be held to be unreasonable.

The second part of our assertion is evident in respect of those matters which are contrary to divine or natural law, even if they are not especially forbidden by human law. In addition to these, however, there are some things which, while not especially prohibited by any law, possess an impropriety, or some condition, on account of which they are thought of as unsuitable, or unworthy of being established by custom. Hence, a custom relating to such matters will be unreasonable even if it is not contrary to the canon, or to the civil law.

The antecedent of this argumentation is founded on the words of Paul in *1 Corinthians* (Chap. xi [, v. 4]): 'Every man praying or prophesying, with his head covered, disgraceth his head'; and later [*ibid.*, v. 6]: '[But if] it be a shame to a woman to be shorn or made bald, [let her cover her head].' Now, these and similar things are not absolutely forbidden by natural law as morally bad, but nevertheless, while they are forbidden by no positive law, divine or human, yet they involve a certain lack of decorum, as is signified by St. Paul, when he adds [*ibid.*, vv. 14–15]: 'Doth not even nature itself teach you, that a man indeed, if he nourish his hair, it is a shame unto him? But if a woman nourish her hair, it is a glory to her.' On this passage Ambrose comments [on *1 Corinthians*, Chap. xi, vv. 14–15]: 'He wishes

1 Corinth. xi.

St. Paul.

St. Ambrose.

[1] [Cf. Section 6, this Chapter.—Tr.]

that this practice be regarded as naturally good, and that it be almost a positive command.' Ambrose here properly uses the words 'naturally' and 'almost', because, the positive law apart, this propriety is natural, in the sense that the natural law prohibits the contrary not strictly but only 'almost'. That limited prohibition is sufficient, however, to render a custom unreasonable, if opposed to what is becoming. This is also made evident in those activities which—while not forbidden by positive law, nor possessing within them an intrinsic evil—theologians speak of as 'suggestive of' evil, since they involve some danger of moral harm, especially if they are frequently done or generally permitted: such as the sale of judicial offices, or the reception of gifts by ministers of justice; or similarly the practice of bestowing a spiritual favour upon the offering of a temporal gift, even though the latter is not given as the price of the former; or the failure of prelates to visit and correct their flocks—and the like. Therefore, customs in matters of this sort, apart from any law prohibiting them, are deservedly held to be unreasonable.

Finally, this matter can be explained from what we have already said on the subject of oaths and vows: that there are some things which, although they are not evil as actions, are evil as promises: as that a husband should promise not to accuse a wife of adultery; or a promise not to revoke a will, and the like. Thus a promise can be unreasonable, even if its subject-matter is forbidden by no law.

The same, therefore, is true of custom. Such in general is any custom which affords a licence to sin: as would be a custom which gave illegitimate children an equal status with lawful heirs, or, one which punished homicide with a light pecuniary fine. These and other illustrations are more discursively treated by Rochus (*De Consuetudine*, Chap. xi, no. 26).

796 11. Whence I conclude that a custom can be unreasonable, even if its subject-matter is not evil, as is evident where its subject-matter happens to be unbecoming, or where it brings with it an element of danger, or possibilities for harm if it should be introduced into common public observance; and this, despite the fact that it is neither evil in itself, nor forbidden by any positive law, such as may be the case in many of the examples cited.

The author's conclusion that a custom can be evil, although its subject-matter is not evil.

And, on the other hand, it is possible that a custom may be bad at least in its inauguration[1] and in the actions by which it is introduced —since they are prohibited at least by human law—and nevertheless may not be unreasonable, because, apart from human law, its subject-matter is not entirely unsuitable for the introduction of a custom

[1] [*in fieri* strictly means 'in its becoming'; *in facto esse* means 'in its actual existence'. Thus, we speak of marriage *in fieri*, which is the making of the contract, and of marriage *in facto esse*, which is the married state.—Reviser.]

Panormitanus. respecting it. This quite clearly is the opinion of Panormitanus (*De Consuetudine*, Chap. xi, no. 4), where he says that the principle of that law, that 'the authority of custom of long standing is of no little moment', can be applied to a bad custom also. For such a custom can, if it is reasonable, prevail against a law; hence, Panormitanus assumes that a bad custom can be reasonable. But this statement is to be understood of that sort of custom which, though bad in its inception, can cease to be bad when established—a matter which we shall explain later.

12. Our conclusion, then, is that the division of custom into good and bad is not the same as that into reasonable and unreasonable. The justification for this statement is found in the fact that the goodness and the evil [in customs] are derived from their objects, or from some law not forbidding the actions or forbidding them; their reasonableness or unreasonableness, however, should—it seems—be judged from their fitness for general usage and for consuetudinary law, as I shall explain in the following Chapter. Nor do the observations made by those who maintain the second opinion opposed to ours, refute this assertion, since the laws and glosses they cite in their support speak in a different sense, as will be presently explained in another section regarding this division. The question there to be answered is: in what manner can a custom contrary to law be a reasonable one? This we shall deal with later on, where we consider in what manner a custom may prevail in opposition to human law.

13. It remains, however, to ask in what consists the unreasonableness of a custom; or, what, beyond and apart from prohibition, is required to make it unreasonable; and conversely, what, apart from goodness, is necessary in order that a custom may be held to be reasonable; and, finally, by what test this can be discerned. Panormitanus treats of this subject at length (*ibid.*, Nos. 5 and 6), where he rehearses many opinions on this point. This is also fully discussed by Rochus (*De Consuetudine*, Sect. 2, no. 20), Bartolus (on *Digest*, I. iii. 32 and on *Code*, VIII. lii. 2), on which Jason and others comment and Menochio adduces many examples (*De Arbitrariis Iudicum Quaestionibus et Causis*, Bk. II, centuria I, case 82). They all, however, set forth this division in one of two ways, as well as the distinction existing between the members of it.

Panormitanus. Rochus. Bartolus. Jason. Menochio.

14. They do so, first, on the basis of the effects of the customs, namely, that that custom is considered unreasonable which will be opposed to the liberty of the Church: or which will afford in some way licence or occasion to sin; or which will be harmful to the general welfare; or which will have some such condition annexed to it—even if the custom is not contrary to divine law. For if a custom should have such a condition, it is always judged as being in the highest degree unreasonable.

What is an unreasonable custom?

On the contrary, however, that custom will be judged reasonable which will not be contrary either to divine or to natural law, or which will not possess any of the aforesaid conditions. It is possible that Navarrus, as quoted above [*Consilia*, Bk. III, *De Censibus*, Consil. vii], meant nothing more than this; and he seems to have thought that all these conditions could be summed up directly and indirectly by the phrase [opposed to natural or divine law]. To me, however, this seems to make the matter much more obscure, because one cannot understand his exposition without reference to similar examples. For the indirect opposition of which he speaks is never necessarily such that, by reason of it, the matter of the custom is truly and strictly of an intrinsic malice contrary to the natural law, since in fact, as I have shown earlier, this is not necessary to unreasonable custom.

Navarrus.

15. Another mode of making answer to this, is to say that no absolutely general criterion can be laid down in this matter: decision must be left to the judgment of a prudent mind. This rule is stated by the Gloss (on *Sext*, Bk. I, tit. II, chap. i, word *rationabile*), and is followed by Francus de Franchis, and other writers on that law. This was also the opinion of Hostiensis (*Summa*: on *Decretals*, Bk. I; tit. IV, chap. xi, § *Quid sit consuetudo*), and his doctrine is accepted by Giovanni d'Andrea, Panormitanus, and others in their comments (*De Consuetudine*, Chap. xi). Bartolus and other authorities take the same view.

Gloss. Francus de Franchis. Hostiensis. Giovanni d'Andrea. Panormitanus. Bartolus.

Those writers who do not reject the first mode of answering the question, but accept it as useful for forming the mind of the judge in a particular case, do leave the final decision to the judgment of a prudent man. These writers are here speaking of the judge who is to decide in the external forum on the character of a custom: with due proportion this mode may also be applied to the case of a confessor in
797 his judgment in the internal forum, and to a divine in giving an opinion. The aforesaid writers understand that this principle has application in the absence of a declaration by positive law as to whether or not a custom is unreasonable; if such a declaration has been made by law, generally speaking, this is the criterion to be applied, as I shall presently explain. Finally, Baldus (on *Digest*, I. iii. 32), and Jacobus Fontanus (in his scholium on *Sext*, Bk. I, tit. II, chap. i) add that in a case of doubt the custom is to be presumed reasonable, and that judgment must be given in its favour. I interpret this statement to apply when a custom is ancient, and has been observed by good men, or by all men in common. When explained in this way, this solution seems to me entirely sound.

Baldus. Jacobus Fontanus.

16. Yet for the fuller exposition of the above point, we must add the rule inserted in the *Decretals* (Bk. III, tit. XI, chap. i), where those customs are held to be unreasonable 'which are neither favoured by reason, nor in harmony with the sacred ordinances'. This phrase is

derived from the Lateran Council under Alexander III (Pt. I, chap. xvi [Pt. III, chap. xvi, ann. 1179]), where it was positively enjoined that those customs are to be observed, 'which are favoured by reason, and are in harmony with the sacred ordinances'. From the words of either passage the inference is to be drawn that a custom is unreasonable if it is without rational basis, even though it be not clearly contrary to reason.

But in order to judge whether a custom is wholly lacking in rational basis it will be necessary to recall that for our present discussion, the reasonableness or unreasonableness of a custom is to be judged chiefly by the criterion of its moral effect, and that this can be manifold. For at one time the custom has the effect of creating an obligation with respect to its observance; at another, of permitting such and such a usage by revoking a law prohibiting it; occasionally, too, it has no more than the effect of approving such an action, or at most, of reasonably urging and inclining men to use it. The effect, then, in respect of which the custom is said to be reasonable or unreasonable, must be carefully weighed that the custom may be so judged. For it may call for the fulfilment of more conditions to achieve one purpose or effect, than to achieve another. Thus, the fulfilment of more conditions is required for a custom to have the power of introducing law, for instance, than is required for a custom to be merely good: and so, in order that it be reasonable, in relation to this end [of establishing law], it is necessary to consider whether the custom possesses, in addition to its character of goodness, the other conditions required for a just law; as, that the burden of its observance be tolerable, and also that it be useful for the public welfare. If, however, a custom is regarded in its relation to the revocation of a human law, in order that it be reasonable, it is not necessary that it be not a bad one—at least not bad because it is prohibited; but it will suffice that, of itself and apart from any prohibiting law, it is not evil. It must, however, have some reasonable cause, on account of which it may be established against the existing law; because otherwise it would be established against the law in an unreasonable way. For, in general, the revocation of a just law without cause is unreasonable. This we shall show later.

17. Wherefore, in considering a custom in relation to those two effects which are of chief importance in this subject-matter—namely, that of enforcing the performance of similar actions, and that of giving release from the obligation to such actions, despite the law—the best rule, it seems to me (assuming the moral rectitude of the subject-matter, at least in respect to its not being repugnant to divine and natural law), is to test the custom by the conditions necessary for a just law, or for the just

Two principal effects in this subject-matter of a custom.

The best rule for discerning whether a custom is reasonable or unreasonable.

revocation of a law. For if these conditions shall have been found to be present in due proportion in the custom, the custom will be judged reasonable in the same proportion; if, however, these conditions are lacking, the custom will be unreasonable, by comparison with such and such an effect.

I find this rule laid down by Geminiano (on *Sext*, Bk. I, tit. II, chap. i), and Antonio de Butrio (*De Consuetudine*, Chap. xi), who are followed by Sylvester (on word *consuetudo*, Qu. I), Soto (*De Iustitia et Iure*, Bk. I, qu. VII, art 2), and Sánchez (*De Sancto Matrimonii Sacramento Disputationum*, Bk. VII, disp. iv, no. 41 [no. 14]). I have used here the words 'by comparison', &c. because, if the custom is to be judged apart from these conditions, and merely in the sense of usage, or voluntary repetition, it will be judged to be a reasonable one, if its matter is not bad. According to this rule, it will be easy to pass judgment upon a custom, in relation to whatever other effect it may have, as we shall make clear in subsequent Chapters dealing with these effects.

Geminiano. Antonio de Butrio. Sylvester. Soto. Sánchez.

In the next section,[1] another subdivision of unreasonable custom will be explained.

CHAPTER VII

WHAT SORT OF CUSTOM IS OR IS NOT CONDEMNED IN LAW

1. Another division of custom now requires explanation, that, namely, of custom condemned in law and that permitted by the law. This division, although it is related to the preceding group, is yet distinct from it, as we shall see. The title of the question is understood as concerned with positive human law; for what concerns the natural law in the matter has been sufficiently discussed in a former Chapter.[2] For a custom which has been found by a prudent judgment applying right reason to be unreasonable will also be condemned in natural law; and a custom which has not been found unreasonable by right reason will not be condemned by the law. Divine law, however, has no rule
798 on this matter, as is evident.

It will, then, be necessary first of all to learn what kind of custom is to be held as condemned by positive law. Some writers hold that every custom expressly and specifically abrogated by law is condemned in law. Others add that this abrogation is not enough, but that it is necessary that the custom be forbidden by law. Others, again, hold that even such prohibition is not sufficient, but rather that it is necessary for the custom to be declared

A custom to be condemned by law ought to be declared unreasonable or specifically prohibited upon that ground.

[1] [i.e. of the following Chapter.—Tr.]
[2] [*Supra*, p. 463; Chap. iv.—Tr.]

unreasonable through law or else that it be prohibited specifically on this very ground, that is to say on the ground that the custom is unreasonable. This last assertion is the true one, and the one more commonly accepted. It is clearly held by Navarrus (*Consilia*, Bk. III, *De Censibus*, consil. vii), Covarruvias, and other writers presently to be cited. We must, then, explain and demonstrate it.

Navarrus. Covarruvias.

2. Therefore, I assert that human law at times abrogates custom; and that at times also it prohibits custom; and that at other times it condemns custom. I say, also, that these three effective dispositions of law are distinct. I do not find the foregoing statement set forth very explicitly by the authorities; in fact, I find even that they frequently confound the meaning of these three. Yet the three are really distinct, as can be gathered from the common teaching on these matters. Indeed, even a fourth member might be added, namely, 'an unqualified opposition to a custom'. But this last, although it is in some respects distinct, seems rather to coincide with the third. I shall, therefore, prove the truth of each of the three separately.

First conclusion.

As to the first point of our first conclusion, in respect to the question of abrogation, or revocation of a custom, I say that it does no more than annul an existing custom. For the phrase derogating from or revoking or (what is the same thing) a revocatory clause proposed in law in absolute terms, can, in the strict meaning of the words, apply only to a past fact: therefore, a law abrogating a custom can affect only a custom already in existence. Just so a written law revoking a contrary law relates to one already in existence: for if there were no law that pre-existed, the revocation would be unnecessary, and even useless. Nor could such a law have been made, except in a case of error, or on the condition that if there is such a law, it be revoked. Therefore, such a law always has reference to a previously existing one. The same is true, then, of a law revoking a custom.

It follows from this that when there is attached to a law the clause, 'notwithstanding any custom whatever', as in the *Constitutions* of Clement (Bk. I, tit. III, chap. vii), and in similar laws, that phrase revokes only a custom already existing: it does not prohibit future custom, since such a clause regards not the future, but merely the past. A custom which can have existence only in a future time, and does not yet exist, cannot be in opposition to a law in the present. Such a clause can annul only a custom which can operate against the law, and hence this law relates solely to an existing custom, and does not extend to future custom. The same is true of every revoking clause, however phrased, unless a qualifying note is added to it.

In what way one must understand the clause 'notwithstanding any custom whatever'.

This position is supported by the consideration that such an effect is of a burdensome character; the meaning, then, of the words of such

a clause should not be extended beyond their force and strict meaning. Usage also confirms this opinion; for when a lawgiver wishes to extend the effect of law beyond the usual one, he makes an explicit statement of that intention, as we shall presently explain.

3. For almost the same reasons, a simple abrogation of a custom is not equivalent to a condemnation thereof, since a custom can be abrogated, not because it is unreasonable, but simply for the reason that it pleases the lawmaker so to do, since he judges that, under present conditions, this course is more expedient. It is, obviously, possible for a certain custom to be, in a certain situation, in some way inexpedient, even if it is not essentially bad or unreasonable. This seems to be self-evident if we keep in mind what was said in a previous Chapter[1] about bad and unreasonable custom. When, therefore, a law revokes a custom simply or without any further declaration, there is no presumption that the law condemns it as unreasonable. Just as, when a subsequent law revokes a prior one, it is not therefore to be presumed that it condemns the earlier one as bad or unreasonable. Generally speaking, from a legal standpoint, what is not proved to be evil, nor condemned as such, is not presumed to be bad, but rather is presumed to be good, even if some other course is at the time preferred because it can produce more useful effects, or is judged to be here and now more expedient.

A simple abrogation of a custom is not equivalent to a condemnation of the same.

Finally, this opinion is clearly to be gathered from the passage in the *Sext* (Bk. I, tit. II, chap. i), which says that a law does not abrogate a reasonable custom, 'unless an express provision is made in the law'.[2] These words imply, therefore, that law does at times revoke a reasonable custom, and that, from the fact of revocation alone, no conclusion is to be drawn that the custom is unreasonable or condemned.

This doctrine is in both its members that commonly taught, a fact that can be seen from the Gloss on the *Constitutions* of Clement (Bk. I, tit. III, chap. vii, word *consuetudo*) and Alexander of Imola thereon [*Consilia*, Bk. VI, consil. 134, no. 33], Dominicus de S. Geminiano (on *Sext*, Bk. I, tit. II, chap. i), Angelus de Clavasio (*Summa*, on word *consuetudo*, no. 9) and Sylvester ([word *consuetudo*,] Qu. 6, no. 10), although the latter seems to contradict the first part of our thesis. Of this obscurity I shall, however, speak in a moment. Ancharano, Panormitanus, and others (on *Decretals*, Bk. I, tit. II, chap. xiii) hold the same opinion, as also does Felinus (on *Decretals*, Bk. II, tit. XIX, chap. ii, no. II), where he cites Bartolus, Baldus and other writers. Navarrus, (*Consilia*, Bk. III, *De Censibus*, consil. vii), and Covarruvias (*Variarum Resolutionum*, Bk. III, chap. xiii, no. 4, concl. 4) are also in

Gloss. Imola. Dominicus de S. Geminiano. Angelus de Clavasio. Sylvester. Ancharano. Panormitanus. Felinus. Bartolus. Baldus. Navarrus. Covarruvias.

[1] [*Supra*, p. 483; Chap. vi.—Tr.]

[2] [Suarez indicates by italics that this statement is a direct quotation from the canon law. As a matter of fact, only the clause 'unless an express provision is made' is a verbatim citation from the *Sext*; the first part of the statement being a paraphrase.—Tr.]

Antoninus. agreement with us here, although the latter seems to hold a different doctrine on the second point, where he agrees with Antoninus, whose opinion I shall discuss immediately.

Antoninus. 4. Antoninus ([*Summa Theologica*,] Pt. I, tit. XVI, § 6) seems to 799
Archidiaconus. Giovanni d'Andrea. hold a doctrine opposed to that set down in the first member of our assertion, and cites in his support the authority of Archidiaconus and Giovanni d'Andrea (on *Sext*, Bk. I, tit. II, chap. i). For Antoninus says that even though the law does not condemn the contrary custom, if it abolishes that custom simply and without qualification, nevertheless, it is to be understood as abolishing not only existing custom but future custom also. This seems to be the import of the teaching of Angelus de Clavasio (*ibid.*) and of Sylvester (*ibid.*, no. 9), in the case of laws that carry a clause derogating from a custom. In support of their opinion they cite the authority of Bartolus and Antoninus, and derive it from the arguments of Panormitanus (on *Decretals*, Bk. II, tit. XIX, chap. ii, no. 8) and those of Felinus (*ibid.*, no. 11). They seem to hold [that the law *condemns* future custom] even if the law does not expressly prohibit for the future. This seems to be the trend of their argument, namely, that the law is continuously in force; therefore, if the law once and for all explicitly derogates from a custom, it does so for all time, and is continuously in opposition thereto. Covarruvias (*Variarum Resolutionum*, *ibid.*, concl. 2), also, can be cited as holding this opinion. In the passage in which he seems to do so, he uses the word *reprobandi* (condemning), which involves a different principle, as I shall presently show.[1]

Angelus de Clavasio. Sylvester. Bartolus. Panormitanus. Felinus.

Covarruvias.

Other authors, however, to avoid self-contradiction, speak not of a law merely revoking a custom, but only of that which stands unconditionally opposed to a custom. But this involves still another principle, as I shall immediately make clear by indicating the words by which such opposition arises out of the law, and what effect such opposition has. And so the argument advanced [against our position] may at most have some force in the case of a law that stands in unconditional opposition to a custom, but it has no weight against the doctrine we have laid down. For a law dealing merely with a past action always has, of course, force against that action; but it never can have force against something in the future, which was not in being when the law was enacted.

5. As to the second point of our first conclusion, that concerning law prohibiting a custom, it must be said that the law forbidding a custom contrary to it, annuls not only past custom, but also future custom: or rather, it sets up a barrier to or prevents its introduction; it does not, however, on that account, condemn such a custom.

A law prohibiting a custom contrary to it has reference to both past and future customs.

[1] [*Infra*, Section 7.—Tr.]

The first part of this assertion assumes that law does sometimes prohibit a future custom. This is the common doctrine, and as an example of such prohibition there is usually offered the law of the *Digest* (XLVII. xii. 3, § 5). This law, it is true, refers to a municipal ordinance, but it is cited for purposes of comparison. Thus Tiraqueau (*De Utroque Retractu*, Pref., no. 17) infers from this law that 'when a law condemns (that is, prohibits) a future custom, it does so by specifying that custom'. Hence the authors just cited, Antoninus, Angelus de Clavasio and Sylvester accept the first part of the above conclusion. Navarrus and Soto (*De Iustitia*, Bk. I, qu. VII, art. 2), have done the same more explicitly.

Tiraqueau.

Antoninus. Angelus de Clavasio. Sylvester. Navarrus. Soto.

The reason here is clear, since a prohibition has reference to actions in the future: for it cannot forbid those which are past; nor can it forbid present actions, not, that is, in so far as they have already taken place, but only to the extent that they may not persist in the future, for only as such are they capable of prohibition. Hence, if a law prohibits a custom, it opposes not only that which has been established, but that which is to be established, and, in so far as the law of itself can do so, it sets up an obstacle against its introduction.

Now the law is understood to prohibit a custom, first, if it expressly prohibits that any custom be permitted introduction contrary to that law; or when it forbids its introduction, as Navarrus says. Again, the law does so—as is probable—when it absolutely prohibits every contrary custom, even if that law does not expressly mention the future or the introduction of the custom, as when it says, 'It is our will that no custom have force against this law', or carries a clause to that effect. Such a law would seem to have reference to all such custom, both that which is in existence and any that can be introduced. It would seem also to oppose all such, because the words are quite absolute and universal in application, and apply without distinction of past and future, and there is no evident reason why their application should be restricted.

The writers of whom we have been speaking interpret as of the same import a clause which derogates without qualification from a contrary custom. Antoninus speaks in this sense, when he says that a custom is abolished absolutely by such a law. Such a meaning can be inferred from the example which he brings forward from the *Code* (XI. lviii [IV. xxxii. 26, § 3]), where it is said: 'Nor is it permissible for a judge to increase the said rate of interest by reason of a custom existing in the region.' These words would seem not only to revoke an existing custom, but also to oppose it absolutely, even for the future, because these words include not merely a revocation, but also a prohibition. This is evident from the words *nec licet iudici* (nor is it permissible for a judge): for the words *non liceat* (it is not permissible) express a prohibition, and are, therefore, addressed to judges exercising their office not only at that time, but at all future times. The words apply, accordingly, to future

custom in the time of any judge whatsoever. The reason given above is rightly applicable here, namely, that the law is continuously in force.

Bartolus.

But from this passage [, i.e. *Code*, IV. xxxii. 26, § 3] Bartolus infers only that the law revokes a custom of the past. Nevertheless, in the context of that law, the force of those words would seem to be stronger. 800 I gather, however, from the opinion of Bartolus that the words [of such a law] are not to be readily extended to future customs, but are extended only when this is demanded by the strict meaning of the words.

6. The second part [of our assertion in Sect. 5] namely, that a law which prohibits absolutely a custom in the future, does not therefore condemn such a custom—has been taught more explicitly by Navarrus in the passage cited (*Consilia*, Bk. III, *De Censibus*, consil. vii) than by the other writers on this matter. He says that a custom is not unreasonable from the fact that a law is in opposition to it, annulling it or commanding that it be not established, unless the law at the same time declares that the custom is unreasonable or a corruption of law.

A law prohibiting a future custom does not therefore condemn it.

Bartolus.

This doctrine may be inferred from a passage of Bartolus (on *Digest*, I. iii. 32, in *Repetition*, after opposit. 10 [opposit. 11], no. 5), in which he makes a distinction between a condemnation and a prohibition of a custom—even when the prohibition is explicit and relates to the future. And the proof which we used to establish the first conclusion concerning law which revokes custom, can be used with little change here. That consideration is especially applicable which is drawn from the argument that a written law can revoke an existing custom, not on the ground of its being unreasonable, but for other reasons. So also, a written law can forbid the future establishment of the custom, not because it is unreasonable, but because for other considerations it seems expedient to the lawmaker to forbid it: either because he presumes that the reasons moving him to revoke it will be continuously applicable, and so he is moved by them to prohibit it; or because he may wish, perhaps, through the addition of the prohibition to give greater inducement and compulsion to the observance of the law. Therefore, from the prohibition for the future alone, we cannot infer or presume that the custom[1] is unreasonable, or that it is condemned as such. But what effect such a law may have on the custom thus prohibited, we shall see in the following Chapters.

7. I come, therefore, to the third point of our first conclusion, that which deals with custom condemned by law. For the conclusion to be drawn from the foregoing discussion is that a custom is condemned in law, when to a revocation or prohibition there is added in express terms the declaration that the custom is unreasonable.

A custom is condemned when it is expressly declared to be unreasonable.

[1] [Reading *consuetudo* for *lex*.—Reviser.]

Such a declaration is made in the laws in various ways. An example is the passage in the *Sext* (Bk. III, tit. iii, only chap.), where the words, 'disapproving entirely of that custom', are used. In the *Decretals* (Bk. II, tit. xix, chap. ii), we read: 'we condemn such a custom'. In the *Decretals* (Bk. I, tit. iv, chap. v), a certain custom is made void since 'by reason thereof the force of ecclesiastical discipline would be broken'. Again (*ibid.*, chap. iii), a custom is abolished 'because it is held to be not reasonable', and (*ibid.*, chap. vii), 'since this is rightly thought to be not so much a custom as a corruption'. In the *Decretals* (Bk. III, tit. vii, chap. iii), a certain custom is termed 'evil', and later another is declared to be 'contrary to what is proper, opposed to rectitude and in violation of the canonical ordinances'. Accordingly, I think that the principle stated above is valid when a custom is termed 'an abuse', and is declared as such not to be of obligation, as is stated in the *Decretals* (Bk. I, tit. iv, chap. x).

When, therefore, in some such fashion, a custom is condemned, then the law has the force, not only of prohibiting it, but also of declaring it to be bad—as Covarruvias held (*Variarum Resolutionum*, *ibid.*, conclusion 2). Thus, the law is said to revoke such custom specifically. For the same reason words of this kind are necessary, because without them the law does not state what the character of the custom was or is; it does no more than forbid it.

Covarruvias.

8. Whence, it follows that, even though it is a custom of the past which the law annuls, if, by way of justification, it adds that the custom is corrupt or is unreasonable, by that very fact the law also forbids and condemns a future custom of the same sort, as long as the circumstances remain the same.

This opinion is that of Panormitanus (on *Decretals*, Bk. II, tit. xix, chap. ii, nos. 7 and 8), and Tiraqueau (*De Utroque Retractu*, Pref., nos. 18 and 19), who refers to many other authorities. Their argument in proof of this opinion is that an unreasonable custom is prohibited by every law and for all time, according to the *Decretals* (Bk. I, tit. iv, chap. xi), and other Chapters. Navarrus was also of this opinion, and the passage in the Gloss (on *Decretals*, Bk. I, tit. iv, chap. xi, word *rationabilis*) is of the same sense: 'that is a reasonable custom, which the laws do not condemn'. The word 'condemn' (*improbandi*) here is to be taken in its proper meaning, and it must be understood in the same sense where it is stated at the end of the Chapter that reasonable custom is one 'which is not opposed to the canonical ordinances'—those ordinances, namely, as Navarrus notes, which condemn unreasonable customs. Whence the same Gloss adds, an unreasonable custom is one 'which is condemned by law', and from all the laws which it cites, it is clear that the word 'condemned' is used in its proper sense.

Panormitanus. Tiraqueau. Navarrus. Gloss.

Finally, writers must be understood in this sense when they say that a custom condemned in law can no longer be valid; and although they sometimes use the word 'derogation' in this connexion, they can be modestly interpreted as holding the doctrine here set forth. The proper definition of the term 'derogation', and the difference between a custom from which there has been a derogation and one that has been prohibited or condemned, I shall explain in Chapter xvi of this Book.

9. It remains to notice that this condemnation of a custom can be understood as accomplished by the law in two ways: by a mere declaration of law, or by way of regulation as well. The former takes place only when a custom is either so clearly evil as to be contrary to natural or divine law; or when it is evidently useless, and harmful to or at variance with the general welfare. The latter way seems to be used when it is not immediately evident from natural or divine principles alone that the custom is unreasonable, and nevertheless for the sake of greater decorum, or for the good of religion, or for the rigour of discipline, the law provides that the custom in question is to be held as unreasonable. For unquestionably it is possible for human law, and especially for the canon law, to do this, since such a regulation by the law may be in the highest degree proper in the interest of good morals. 881

Condemnation of a custom can be effected in a twofold manner.

The distinction between these two modes of condemnation is to be seen in the language of the laws themselves. For sometimes a custom is condemned by the phrase *declaramus* (we declare), as in the *Decretals* (Bk. I, tit. IV, chap. x). At other times, however, the verb *irritare* (to make null and void) is used, as in the *Decretals* (*ibid.*, chap. v), where it is said: 'We have decided that such a custom is to be made null and void.' These words indicate, in their *strict* sense, that such a custom previously and of itself was not void; and consequently, that it is not essentially unreasonable, but only that it has been made void by law. This point is admirably made by Molina, in his work *De Iustitia et Iure* (Tract. II, disp. 79). Still, I hold that by such nullification, a custom of that character has remained for ever condemned by law. For that nullification (*irritatio*) was not a nullification of some particular fact, nor was it (so to speak) a transitory one; it was constitutive of law, and as such, universal and perpetual; therefore, it applies always, and always resists a custom of that kind as an unreasonable one. This is made clearer by the fact that this voiding [law] was imposed not as the punishment of a fault, but for the reason that, 'if such a custom were to stand, the force of church discipline would be broken'. [This voiding law] was, then, set up in essential opposition to the establishment of a custom in that matter, to prevent for all time the disruption of the force of church discipline that would be brought about through

Molina.

such a custom. For it is not alone the intrinsic character of the things to be done or not to be done that determines the nature and condition of a discipline, but rather the fact that the law rules that this or that must or must not be done. It is for this reason that we said that the condemnation of the custom of which we have been speaking was not a purely declaratory one, but rather one regulatory in its nature.

10. In this sense, also, are to be understood many laws condemning certain customs or prescriptions, which, from the nature of the case alone, do not immediately seem to be unreasonable. In the same way, some decrees condemn customs which unsettle canonical ordinances, or curtail them, as being opposed, that is, to the exactitude intended by them. Moreover, in this sense is to be understood the Gloss quoted above (on *Decretals*, Bk. I, tit. IV, chap. xi, word *rationabilis*), which says that a custom is unreasonable which the law condemns. This meaning would seem to be the only one admitted by Baldus (*Consilia*, Vol. V, cons. 401 [cons. 349]), when he said that in order that a custom may be spoken of as reasonable, it is enough that it be not condemned. Yet this statement does not seem to be strictly true; since a custom can be essentially, and of its own nature, unreasonable, although it has not been condemned in law.

Gloss.

Baldus.

It is possible, then, that these writers intended their words as applying only to the external forum; or, at all events, that opinion can be understood to refer to a condemnation by law, either on some particular ground, or, at least, upon general principles—as, for instance, that the custom weakens the force of church discipline, or that it derogates from the liberty of the Church, or for some reason of a similar character.

Finally, a distinction can be drawn between these two modes of condemnation; for that which is purely declarative seems to be the more immutable of the two, as founded in natural reason alone, or in the divine law; the other, which is positive, since it emanates from human law, can suffer change, either through new law, or sometimes by reason of change in the matter itself. This is the opinion of Panormitanus (on *Decretals*, Bk. II, tit. XIX, chap. ii, no. 8, and *De Consuetudine*, Chap. xi, no. 12 [no. 21]), as we shall explain at greater length in Chapter xvi of this Book.

Panormitanus.

CHAPTER VIII

CONCERNING ANOTHER DIVISION OF CUSTOM INTO THAT WHICH IS VALID BY PRESCRIPTION AND THAT WHICH IS NOT

1. This is the last division of custom, and I have determined to discuss it in this Chapter, because a clear notion of it is necessary both

for a treatment of this matter, and for the explanation of the effects of custom. In this whole matter, the chief difficulty centres round the nature of custom valid by prescription, and we shall, therefore, give most of our attention to that; for when that has been made clear, it will be easy to explain the nature of custom not validated in that way.

Cynus. Pierre d'Ailly. Panormitanus. Angelus de Ubaldis.

Certain civil jurists, we must begin by noting, have said that there is no such thing as consuetudinary law obtained by prescription. Cynus and Pierre d'Ailly, who are referred to by Abbas [, i.e. Panormitanus,] (*De Consuetudine*, Chap. xi, no. 7) and Angelus de Ubaldis (on *Code*, VII. xxxix. 8) held this opinion. They were induced to think so, because custom is not settled law; but rather it settles 802 law. For it is thus, as we have pointed out in Chapter One of this Book, that the custom of which we are treating is to be distinguished from prescription. The custom, accordingly, that we are here discussing, is not prescription; it cannot, therefore, be validated by prescription.

The logical validity of this argument is established as follows: when it is said that a custom is validated by prescription, the assertion is made either of a custom of law or of a custom of fact. But the first cannot be separated from the second, because whatever is established by prescription is established through prescription by a usage of some sort. Therefore, if the legal custom is validated by prescription, it must be validated by some usage, which is nothing else than the custom of fact itself. With reference to that, we must ask in turn: by what usage can it be validated by prescription? By some usage distinct from itself, or by itself? But not the first, because we observe a custom not by another usage, but by its own, because custom is itself a usage, and a usage is not exercised by a different one. Otherwise, we should be involved in an infinite series. Nor is custom established by itself, since it is not a prescription as assumed; and nothing comes under the heading of prescription except by some specific act of prescription.

Several confirmatory arguments are advanced for this position. One is based upon the fact that **every prescription requires good faith**, but this requirement is not necessary in **this sort of custom, for it can** sometimes, as we **have said, be established by means of sinful actions.** Likewise, a prescription demands a definite period of time, fixed by law: but in the case of this custom there is no law that requires a fixed time for the prescription. Finally, every prescription is obtained against some individual who is unwilling to have it established; but this element is not present in the custom of which we are speaking. For all these reasons, **validation by prescription cannot** be demanded in this sort of custom, and therefore the distinction laid down by us cannot stand.

2.[1] Nevertheless, we must assert first, that there is a custom which

[1] [This section-number omitted in text.—Tr.]

settles law, that is, which is legal, and which can be validated by prescription. This statement is explicitly made in the canon law (*Decretals*, Bk. I, tit. iv, chap. xi), in the words: *legitime praescripta* (legitimately established by prescription); it is sufficiently suggested by the *Sext* (Bk. I, tit. iv, chap. iii), as also in the *Decretals* (*ibid.*, chap. viii), on which the Gloss comments in the last note, as well as in the *Decretals* (Bk. II, tit. xii, chap. iii), on which the Gloss also comments (on words *De Consuetudine*), and in other passages to which writers on this matter refer.

The existence of a customary prescription is approved.

In connexion with these references, the reader must remember that the laws use a different manner of language, when they deal with the true prescription of things, or of private rights. [This caution must be given] since we are dealing, not with prescription, but with legal custom. In respect of that, we find scarcely any law requiring that a custom be validated by prescription, except[1] the aforesaid last chapter (*Decretals*, Bk. I, tit. iv, chap. xi). For the *Sext* (Bk. I, tit. iv, chap. iii) may perhaps refer to prescription, since it treats of the custom of a bishop with respect to his exercising his jurisdiction without the advice of his cathedral chapter. But the *Decretals* (Bk. I, tit. iv, chap. viii), makes no mention of a prescriptive custom by name, but merely says: 'If the custom has been such as to prejudice the common law [...].' *Decretals*, Bk. II, tit. xii, chap. iii, is best interpreted as relating to a true prescription concerning a right of election, and *Decretals*, Bk. I, tit. vi, chap. I, deals with prescription, also, in speaking of the subject of elections, as do other Chapters which are cited.

Nevertheless, one law is sufficient to oblige us not to depart from its terms. Upon this point, the canonists thereon (on *Decretals*, Bk. I, tit. iv, chap. xi) are agreed: Panormitanus (*De Consuetudine*, Chap. xi, no. 7), Rochus (*De Consuetudine*, Sect. 3, at the beginning) who deals with it at great length, Antonio de Butrio and others thereon (*De Consuetudine*, Chap. xi), and Cardinal[2] (on *Decretum*, Pt. I, dist. viii, can. vii). Bartolus mentions this view explicitly, in writing against Peter, to whom he alludes (on *Digest*, I. iii. 32, in *Repetition*, Qu. 2, no. 15). Baldus, Jason and others set forth the same opinion on this matter (on *Digest*, I. iii. 32). The Gloss (on *Digest*, L. xvii. 166 [54]) provides an excellent statement of the same tenor.

Panormitanus. Rochus. Antonio de Butrio. Cardinal. Bartolus. Baldus. Jason. Gloss.

Now, even though it may seem to be a mere matter of words, I think that it is necessary for a clear discussion [of prescriptive custom] that we give some attention to the manner in which the jurists just mentioned speak of it, defining it rather from the connotations of the word 'prescription', than from the nature of the custom itself. Thus, Panormitanus says that for a custom to be [prescriptive] means no more

Panormitanus.

[1] [For *praeter* read *praeter*.—Tr.]
[2] [i.e. Gratian.—Tr.]

Rochus.

than that it has been secured through the running of a period of time required for a prescription. Rochus (*De Consuetudine*, Sect. 3, at the beginning), in like manner, says that to assert that a custom ought to be established by prescription, is equivalent to saying that it demands a certain duration of time. Baldus (on *Digest*, I. iii. 32, opposit. 7)

Bartolus.

states that a prescriptive custom is one which is perfected and firmly grounded through lapse of time. Bartolus, however, explains the term 'validated by prescription' as meaning 'established by custom after the manner of a servitude'. This latter definition would seem to be different from the preceding one, yet both are true when their meaning is properly interpreted.

3.[1] Therefore, in order to explain better the above assertion and its basis in reason, I note that, just as of a true prescription, so also of a custom, it is true to say that both the custom, and the right which has been acquired thereby, can be validated by prescription. Thus, in the case of a true prescription, a house, a servitude, or an action can be said to be the objects of prescription: consequently, the custom of making use of such a thing is the prescription itself. However, it is not such, unless it has been consummated within a required period of time, along with other circumstances. Therefore, when such is the case, it is also termed a 'prescriptive', to distinguish it from an inchoate custom, or from one imperfect in some other way.

Both custom itself and the right acquired through it can be validated by prescription.

So then, a custom of the sort that we are here discussing, can, in so far as it is a legal entity, be validated by prescription, since prescription has been acquired by means of a custom that has been consummated, that is, by a custom fulfilling the conditions required by law. This is the doctrine of Bartolus, and he bases it upon analogy with a prescription of a servitude. For although there is a difference in the rights acquired in a servitude and in those of an unwritten law, nevertheless, the manner whereby each is established, is—with due proportion—the same. Thus, also, a consuetudinary law may be said to be validated by prescription.

803

Whence, also, it is to be said that the custom of fact itself, through which a legal right is established, in so far as it requires the assistance of the law to attain a certain degree of perfection and consummation, may be termed a prescription: for the right itself cannot be said to have been validated by prescription, unless the approach thereto (so to speak) may be called a prescription. And, therefore, such a custom of fact may be said to be prescriptive, in order to distinguish it from a custom which is inchoate or imperfect; that is, in order to show that it has fulfilled all the conditions called for by the law, and that especially which touches the time of its running. This is the meaning of the words of Baldus and

Baldus.

[1] [The section number is omitted in the Latin text.—Tr.]

Panormitanus (*supra*) and that of the Gloss (on *Digest*, L. xvii. 54) when this Gloss speaks of a firmly grounded custom.

Panormitanus. Gloss.

4. The basis, then, of the contrary opinion is easily destroyed. Primarily, the opinion is based upon an ambiguity in the terms. For, when, earlier in this Book,[1] we distinguished custom from prescription, we also pointed out that these words are sometimes taken in a broad meaning and used interchangeably. For even prescription is a custom brought to its culmination in a certain way; and, every custom brought in like proportion to completion is usually called a prescription; in the same way, a custom can be called a prescription, as well in law as in fact, as has been explained. When, therefore, in an earlier Chapter we distinguished custom from prescription, we were using these two terms in their strict meaning. For the present, however, we assert that it is possible for a custom, even a legal one, to be, and to be spoken of as prescriptive in the broader sense of that term.

Refutation of the contrary opinion.

Our answer to the argument for the contrary opinion is that a custom in its character of a legal rule takes its epithet 'prescriptive' from the character of the custom by which it is acquired; but that a custom of fact takes that epithet from the conditions wherewith it was involved in order to be such: namely, because it is of long duration, is voluntary, is observed by common consent, and the like. So the custom itself can be said to be prescriptive, for the reason that it has that completeness (as it were) by its own intrinsic and essential perfection. Further, we can say almost the same thing of any prescription properly so-called.

Custom and prescription when used in the broad meaning are equivalent to each other; but in their exact meaning they are distinct.

In reply to the confirmatory argument for the contrary assertion, I say that it proves no more than that this custom is called 'prescriptive' owing to conditions different from those which are proper to a true prescription, and that consequently prescription properly so-called and prescriptive custom are not identical. It does not, however, prove that this custom is not prescriptive in the broader meaning of that word [as we have defined it].

5. From this solution of the arguments opposed to ours, it is clear that this use of the adjective 'prescriptive' and this definition of its meaning, indicate that there is a kind of custom which requires, together with the fulfilment of other conditions, a certain duration of time in order that it may be true custom, and be without qualification called such by the law. This is the cardinal point of our present discussion, and that which we must now take up to establish our conclusion.

In the first place, the question may be asked, whether legal custom occasionally requires for its validity the running of a fixed length of

[1] [*Supra*, pp. 448 *et seq.*—Tr.]

time, that is, a period and duration such as are demanded for a true prescription. On this point, it may be noted that the opinion of some theologians denies that a definite time is required for establishing a legal custom, that is, one establishing unwritten law; they hold that this period should be defined at the discretion of a prudent man. This Soto held (*De Iustitia*, Bk. I, qu. vii, art. 2), and his opinion is followed by many of the modern commentators upon St. Thomas (I.–II, qu. 97). They are induced to think so because this period is not fixed by the nature of the matter, as is self-evident; nor, again, is it fixed by canon law, nor by civil—at least by common civil law—hence, [they say,] it is not possible for such period to be defined in any other manner than by the decision of a prudent judgment. The validity of the inference appears self-evident; no other way of fixing the period of time can be thought of. The proof of the minor premiss is that all laws, canonical as well as civil, which designate a certain time for the running of the prescription period, have reference to a private prescription, or to a legal disposition, as in the case of ownerships, servitudes, and of similar rights; hence, the argument runs, the periods fixed by these laws cannot be extended in such wise as to regulate legally the period of time requisite for a legal custom.

Soto.
St. Thomas.

6. The antecedent, as far as canon law is concerned, is proved from the fact that all the laws which are cited on this point clearly refer to prescription properly so called, a fact which I have noted.[1] This can be seen in the entire title concerning custom [, i.e. *Decretals*, Bk. I, tit. iv], in which custom validated by prescription is dealt with only in the last Chapter of this title; and that Chapter makes no mention of the length of time necessary for the running of such custom.

In relation to the civil law, the truth of the statement in the antecedent[2] is a better ascertained fact. Abbas [, i.e. Panormitanus] (*De Consuetudine*, Chap. xi) expressly admits it, and because of it[3] some civilians deny that a custom can be validated by prescription, as I have said. Those who hold the opposite opinion ought to produce a text to prove it. And hence I have referred only to the common law that prevails generally; for the matter might be otherwise in the case of the special law of a particular kingdom. But of this I speak later. The validity of the inference [in proof of the subsidiary argument] is demonstrated from the fact that a true prescription is very different from a custom: so different, that what is determined in the one, cannot, with any foundation, be extended to the other. This is especially true, since with respect to each the reasoning is not the same: for in a prescription, a right is acquired by one

804

[1] [See *supra*, Section 2.—Tr.]
[2] [That time is not of the essence of consuetudinary law.—Reviser.]
[3] [The opinion of Panormitanus.—Reviser.]

person against another, contrary to the latter, who is deprived of his own property, or of his right; and it is for this that it has been necessary to fix definitely a certain time within which the [former] owner of a right can and ought to exercise diligence, in order to recover his own property, or to preserve his own rights, so that if he neglects to do so, he may be justly deprived of them. For this reason, then, according to the character of the property involved, and according to the presence[1] or absence of the person prescribed against, a longer[2] or shorter time[3] is usually defined for the establishment of a prescription. In the establishment of a custom, however, no prescriptive right is acquired against an unwilling person; in fact, the custom is founded upon the tacit consent of the prince, as we say below; and hence it has not been necessary to define the length of the period whenever there is sufficient ground for assuming his tacit consent: the mere continuity of the custom for a longer or a shorter period suffices.[4]

7. Nevertheless, I assert that for the prescriptive custom of which the laws speak—at least those in the *Decretals* (Bk. I, tit. iv, chap. xi), previously referred to—a certain, and definite time must be fixed. The secondary question, whether that period should be of this or that number of years, we shall discuss later. This is the opinion of the doctors of both the canon and civil law. The canonists, including Giovanni d'Andrea, Panormitanus, Antoninus and Rochus (*De Consuetudine*,[5] Sect. iii, no. 1), give it as their doctrine in their comments on this chapter.

A definite time is required for a custom obtained by prescription. [Suárez rebuts the argument developed in Sections five and six.]

Giovanni d'Andrea.
Panormitanus.
Antoninus.
Rochus.

This is the doctrine, likewise, of the Gloss and of the Doctors (on *Sext*, Bk. I, tit. ii [tit. iv], chap. ii, and on *Decretum*, Pt. I, dist. viii, can. vii; *ibid.*, dist. xi, can. iv; *ibid.*, dist xii, can. vii). It is that maintained by Abbas [, i.e. Panormitanus] and Felinus (on *Decretals*, Bk. I, tit. xxxiv, chap. i [, no. 6]). It is set forth as the common teaching by the jurists (on *Digest*, I. iii. 32), by Bartolus (*ibid.*, qu. 2, at the beginning, no. 14); by Baldus and Jason (*ibid.*, no. 41 [no. 27] and on *Institutes*, I. ii, § 9). The teaching of these writers is followed by Gregory López (on *Las Siete Partidas*, Pt. I, tit. ii, law 5, gloss 4 [*glossa* g]), by Burgos de Paz (in Bk. I in *Tauri.*, no. 205), by Alexander of Imola (*Consilia*, Vol. II, consil. 66 [consil. 68, no. 1]). It is the opinion, also, of St. Antoninus (Pt. I, tit. xvi, only chap., § 4), Angelus de Clavasio (in his *Summa*, on word *consuetudo*, no. 8), Sylvester ([word *consuetudo*,] Qu. ii [, no. 6]), and Antonius Corduba ([*Quaestiones*,] Bk. I, qu. xii, ad 4).

Gloss.
Panormitanus.
Felinus.
Bartolus.
Baldus.
Jason.
Gregory
López.
Burgos de Paz.
Alexander of Imola.
St. Antoninus.
Angelus de Clavasio
Sylvester.
Corduba.

[1] [Suárez is referring here to the knowledge or ignorance on the owner's part of the act of the person attempting to obtain the prescriptive right.—Tr.]
[2] [For *mats* read *maiore*.—Tr.]
[3] [Suárez probably intended to say: 'according to the presence or absence of the person prescribed against, a *shorter or longer* time is usually defined for the establishment of a prescription', since a shorter space of time is usually required for the prescriptive period to run against an owner who is present.—Tr.]
[4] [Reading *sufficit* for *sufficiat*.—Reviser.] [5] [For *De Constitution.* read *De Consuetudine*.—Tr.]

Navarrus. Molina.

Finally, Navarrus (in *Consilia*, Bk. I, *De Consuetudine*, consil. ii [consil. i]) and Molina (*De Iustitia*, Tract. II, disp. 77), propound the same opinion.

It does not, then, seem safe to dissent on a moral question from an opinion which is so generally received. This is especially true, since this whole question is so intimately dependent upon positive law—in which case, the opinions of those who are experts in that branch of law must have greater weight than the opinions of those who are not thus expert. Again, no convincing argument in support of the opposite assertion can be given.

8. The first proof of our assertion [*supra*, Section 7] is taken from the *Decretals* (Bk. I, tit. iv, chap. xi), where, among the conditions of the custom there mentioned it is specified that it must be the result of prescription. But it cannot be said to be the result of prescription, except in relation to a definite, legitimate time, during which it should continue in order to be established by prescription.

Some reply to the above argument, that such custom is said to be prescriptive, not univocally—as is the case with rights of ownership and other similar rights, which are obtained by prescription—but by analogy only, and because it is modelled upon true prescription in the sense that it is firmly grounded by running for a certain length of time, which if not that fixed by law, is at least that defined as sufficient by a prudent judge.

An evasion.

But this evasion is arbitrary, and is contrary to all the authorities. Furthermore, it seriously impairs the force and utility of that law [*Decretals*, *ibid.*]. Wherefore, although it may be true that custom is different from prescription, nevertheless, it is necessary that this kind of custom which is spoken of as prescriptive, should accord with true prescription at least in the requirement of a long period of time within which it is said to be established, that is, validated by prescription; otherwise the term has no definite meaning.

The evasion is rejected.

When, then, that same law [*Decretals*, *ibid.*] requires that the custom be established by prescription, in language of the same character as that employed in other decrees demanding that a right of election, or other similar right, shall be lawfully established by prescription, we must hold that the law speaks univocally, at least respecting the period of time requisite: otherwise, it would leave the peculiar prescriptive character of the custom unexplained. Therefore, Panormitanus and almost all the writers have made it plain that the custom must be established by prescription, that is, must be obtained by reason of a period of time of length sufficient for a prescription. Even the word prescription itself connotes a fixed length of time: what is left to the free decision [even of a prudent judge] cannot be definite, or prescribed.

9. In the second place, a confirmation of our assertion is to be drawn from the term 'a long continued custom' which is used in that same chapter [*Decretals*, *ibid.*]. This term is taken from the civil law (*Code*, VIII. lii. 1, and from *ibid.*, 2). In other passages, it is spoken of as custom 'of long standing' (*diuturna*), as it is in the *Institutes* (I. ii, § 9) and in the *Digest* (I. iii. 33).

The expression 'a long time' legally means at least ten years; nor is the determination of this period left by the law to the judgment of a prudent individual.

805

The phrase 'a long time', however, or 'long continued', is not an indefinite one in law, nor is it left to the discretion of a prudent individual, but means a period of at least ten years. The phrase, then, 'a long time', taken absolutely, refers to a period marked off, on the one hand, from a period of less than ten years[1]—which is held to be a brief period; and on the other hand, from a period longer than twenty years—which is termed 'very long': hence, the phrase denotes a period from ten to twenty years. According, then, to the variety of the attendant subject-matter or circumstances, the law usually requires a period of ten or twenty years. All of the foregoing is clear both from Rubric in *Code*, VII. xxxiii and from laws 1 and 2 and the following title (*ibid.*, xxxiv). Hence, when a law requires a long time for the sufficient confirmation of a custom, or its validation by prescription, the phrase is not indefinite in its meaning, but definite: its meaning is fixed by law, and it definitely indicates a period of at least ten years.

10. If, then, any one of the conditions of prescriptive custom is to be left to discretion, it must not be that which relates to this requirement of a full ten-year period, for this is (as it were) an essential requisite for custom, as such. This is the sense of Gloss 1 (on *Sext*, Bk. I, tit. iv, chap. iv), where it says that in the canon law a custom validated by prescription is one of forty years' duration, but that for a custom as custom, that is, for one intended to introduce new law, a period of ten years, at least, is required: this period, at least, is understood as referring to a long-continued custom. Accordingly, if any discretion were to be allowed [a place in the determination of the time element in prescriptive custom], it could be only in cases where the custom has run for a period of more than ten years: and then only to determine whether that period should (as it were) be automatically sufficient; or, whether at that point the decision of a prudent judge is required to determine whether this length of time suffices, or whether a longer period should be awaited.

However, not even in such a case should discretion be admitted: partly because it would subject long-continued custom too much to restriction, and would deprive it of a proper certainty without good reason; partly, and this is the most important consideration, because

[1] [See also *infra*, pp. 567 *et seq.*—Tr.]

in whatever way the fixing of the length of time is left to the discretion [of a judge], there will follow not only a destruction of the true character of prescriptive custom but also of every appearance of one, or even of the appellation prescriptive as it is suggestively[1] applied to any custom, as the first argument in support of our assertion sufficiently proves.

The words of *Decretals*, Bk. I, tit. IV, chap. viii, are of no slight support to our position here: 'If such a custom shall have been approved, which does prejudice to the common law.' These words assume that such a custom is not left to the discretion of any one (for if this were so, the custom could hardly or not at all be approved); but that the custom has its essence and formality as custom defined by the law, and, accordingly, a definite time within which it accomplishes its prescriptive effect—as is there noted by the Gloss.

11. Another argument in confirmation of our assertion is this: the contrary opinion assumes that a long continuance of time is not essentially, but only incidentally, required in a custom which the law calls prescriptive. The conclusion is false. Therefore, . . .

The truth of our conclusion in the foregoing proof will be clear from a consideration of the principle on which the contrary opinion rests. Those who follow that opinion hold that the custom is required for the effects attributed to it, only as a sign of the tacit consent of the prince; hence, they conclude that this kind of custom does not call for a fixed number of years, but only for such a length of time as is needed for indicating in the judgment of an upright man the [tacit] consent of the prince. Therefore, I infer that in that opinion[2] the time element is incidentally required, because it is accidental that the token of consent is completed in a longer or shorter time; for a definite length of time is not *per se* demanded as a necessary condition for that manifestation. Therefore, the inference in the opinion aforesaid is obvious.

Its falsity, however, is proved: First—and here the points we have established earlier in this Chapter must be kept in mind—for the reason that it does not leave this kind of custom even a shadow of a prescriptive character: for a prescription of its essence requires time to run in its favour, and time is definitely determined, as is clear from the language of all the laws [that touch upon it]. Again, and the point is most important, this opinion is contrary to the fact that a custom is frequently actually completed and has become prescriptive in cases where the judgment of a prudent man would not be—human law apart—that the custom sufficed as evidence of the consent of the prince. It is clear, then, that such a custom is not a prescriptive one merely because it

[1] [*coloratae*: The term '*coloratus*' means 'giving a colour to' or 'suggestive of'. The phrase '*titulus coloratus*' is frequently used to signify a title to an office that has some specious justification.—Reviser.]

[2] [For *Hinc ergo in foro ex*. read *Hinc ego infero in*.—Reviser.]

has endured a sufficient time to indicate the existence of the prince's consent to the mind of a prudent judge; but rather, it is because it has been validated by prescription, that it indicates the consent of the prince: therefore, such a prescription cannot be said to be established in such a length of time as only the judgment of a prudent mind can determine: therefore, it can be established only in a length of time that is fixed by law. The logical soundness of these conclusions is self-evident. The truth of the antecedent of my proof will be clear from what we shall have to say in Chapter xvi, concerning a custom which is sufficient for the revocation of a law.

12. I deny, therefore, the minor of the argument for the contrary opinion, and I assert that this period of time has been defined by positive law, both canonical and civil, each within its own sphere.

Reply to the basis of the contrary opinion.

This determination of time may, it must be understood, be effected in two ways. In the first, explicitly and specifically: in the manner, that is, of which we are speaking in the present discussion, and which will be explained more in detail in Chapters xv and xvi. We admit that the laws do not explicitly define the period necessary for this particular subject-matter of laws, that is, of legal customs. The reason is that this mode of explicit determination is not a necessary one; there is another that is sufficient.

The determination of the time necessary can be made in two ways.

In the second way, then, the length of time [necessary for the
806 validation of a custom by prescription] is determined implicitly, and (as it were) by the proper application of general principles expressed in the language of law itself to the case of custom of this kind. It is in this sense, then, that I assert that a fixed length of time is necessary according to law for a custom to become validated by prescription.

For the law itself has distinguished in general: customs that are immemorial, of very long standing, of long standing, and [lastly] common customs, those, that is, existing for a brief period; and the law has determined beforehand for each of these its own manner of duration or definite period; as we, in company with Panormitanus and others, have noted. This determination by the law is, however, a general one, and applies properly to a custom of fact which can establish a right (*ius*) whether of law, or of ownership, or of any other moral power. This opinion will be seen to be that of Baldus (*Consilia*, Bk. V, cons. 34 [cons. 349,] no. 2) and of Petrus Philippus Corneus (*Consilia*, Bk. IV, cons. 188, no. 10). Baldus.

In particular, however, respecting a custom which establishes or destroys a legal right, the laws determine that [the period of time] ought to be very long or protracted, or that the custom should be

[1] [Latin text incorrectly has '80q'.—Tr.]

validated by prescription, as we have shown. Hence, the laws make it clear that a certain definite time is necessary for such a custom. Thus, this declaration of the law is clearly not a mere extension of the principles applicable to a prescription properly so called so as to cover a legal custom; it is derived from a general determination of time requisite, under this or that denomination, in custom itself. The truth of this assertion will be the more clearly realized when it is recalled that the distinction between custom and prescription, as set forth in the argument of the contrary opinion, is not sufficient. For even though in the case of a legal custom, it is not necessary that the period of time be defined, as in the case of prescription, upon the ground that the custom is initiated in opposition to some person who is passively or actively unwilling that the custom be established, nevertheless such a determination of the running time of the custom can be necessary on another ground no less urgent: in order, that is, that we may have a definite and legal token of the consent of the prince, and that a matter so grave, public, and general in character, should not be left to the uncertain decision of a prudent individual: for it is obvious that even unwritten law ought to be as definite and uniform as possible.

This determination of the period of time is further necessary, because it must sometimes take the place of the [express] consent of the prince, so that such consent will be recognized as given in law itself, even if it is evident that it was not personally granted by the prince himself—a point which we shall discuss later.[1]

13.[2] It remains for us to inquire how long is this period of time which is required for prescriptive custom. This definition cannot be properly made in general terms: for a longer or shorter period may be necessary, as the effects and circumstances of the custom vary. Hence, I shall here do no more than state in a general way that a period of at least ten years is required, on the principle that a long time is necessary, a period which, in law, comprises at least ten years. This has been expressly determined by a law of Spain ([*Las Siete Partidas*,] Pt. I, tit. 11, law 5), where, speaking of a legal custom, it lays down a period of 'ten or, alternatively, twenty years'. Why this law laid down this alternative requirement will be stated in Chapter xv.

At least ten years are required for a prescriptive custom.

I have used in my assertion the words 'at least', because in some cases, more time is required. In Chapters xv and xvi I shall explain what those cases are. Our assertion, as thus explained, is the common one with all the authorities whom I have cited, and it does not involve any new difficulty except one, and that I shall take up in Chapter xvi, because it is more relevant to the matter of that Chapter.

[1] [The principle of the 'legal consent' of a superior is important. Laws are framed sometimes in such a way that a custom begun and persisted in may automatically receive the consent of the superior.—Reviser.]

[2] [This Section incorrectly numbered '14' in the Latin text.—Tr.]

14.[1] It may, again, be asked whether this period of time must be continuous. I reply that it must be so in order that the custom may, in the definition of the aforesaid last Chapter [*Decretals*, Bk. I, tit. IV, chap. xi], be said to be lawfully prescribed. All the commentators on that law are agreed on this point. And they dwell upon the word 'lawfully', since it signifies that the custom must have the same continuity as that demanded by the laws for prescription: but it is clear that an uninterrupted period is necessary for prescription; the same, therefore, is necessary for a custom valid by prescription. This was the doctrine of Frederick de Senis (*Consilia*, 91, no. 5), who, for the reason we have given, has inserted in his definition of custom the condition that the custom be observed without interruption over the usual length of time.

A continuity of time is required in order that the custom may be said to be lawfully validated by prescription.

Frederick de Senis.

Antonio de Butrio holds the same view (*De Consuetudine*, Chap. xi), as does Jason (on *Digest*, I. iii. 32 in *Repetition*, no. 41). This is the teaching, also, of Sylvester (word *consuetudo*, Qu. 5 [, no. 8]) and of Panormitanus (*De Consuetudine*, Chap. xi, no. 19).

Antonio de Butrio. Jason. Sylvester. Panormitanus.

This doctrine is confirmed by the fact that when in law a period of time is put down as necessary for anything, the rule, in cases of doubt and generally, is to suppose that the law requires continuous time—as Lapus (*Allegationes Iuris*, xlvii) has stated. Sylvester (word *religio*, Pt. V, qu. 5 [qu. 4]) supports this opinion, and he cites the language of the Gloss on rubric of *Digest*, XLIV. iii. This view is also that of Navarrus (*Consilia*, 87 [89], *De Regular.*, no. 1) and he cites the text of law 1 of the same title of the *Digest*.

Gloss. Navarrus.

These passages just cited, however, prove hardly anything, and although the next to the last Gloss on the aforesaid law 1, gives some indication, [it is not strictly to our point,] since it is speaking of a prescription.

Gloss.

807 15.[2] But the question may be asked, in what way or when is a custom held to be interrupted. For in the case of a custom no possession is necessary, nor is any other legal ground required beyond the worthiness of the custom, hence it cannot be interrupted on those grounds, as is the case with a prescription. Nor, [so this question runs, can it be interrupted] for lack of good faith, since that too is unnecessary. My reply is that in a certain sense good faith is necessary in order that a custom may establish law, as I state below. Hence, wherever good faith is necessary for a custom, the latter may be interrupted for the lack of it, as happens in the case of a true prescription. For there is a parity between custom and prescription on this point, as will become more clear from what will be said in Chapter xv.

[1] [This Section incorrectly numbered '15' in the Latin text.—Tr.]

[2] [Latin Text incorrectly has '51'.—Tr.]

Panormitanus.

Where, however, good faith is not necessary, custom can be interrupted only by means of actions in opposition to it. Panormitanus thinks that a single contrary action is sufficient to effect this result, because by that act the people give sufficient indication of their unwillingness that this custom be introduced. Thus, if the observance of the custom proceeds in violation of a law, then it may be interrupted by actions in observance of the law. For those actions oppose the custom in question, and they retract the prior will, either of establishing new law, or of revoking the earlier one.

Further, the mingling of contrary usages due to contrary acts makes it impossible that a certain tacit will of the prince be inferred—a point of very great importance with respect to the power of the custom to produce its effect, as we shall see. In order that an act may be sufficient to interrupt a custom, on the one hand, it will be necessary that it be done by the whole community in which the custom has been followed—for the acts of a few private individuals do not obviate the consent of the community, and so they cannot interrupt a general custom; or on the other hand, it will certainly be sufficient if an act contrary to the custom be done with the public authority of the one holding the necessary power—as that some individual should be publicly punished for observing the custom, or that a similar official act should be done, whereby it is proved that this custom was not in accord with the will of the prince.

What actions are necessary to interrupt a custom.

16. The second of the two principal assertions of this Chapter must now be made: that not every custom is established by prescription, and that, accordingly, custom may be divided into customs which are validated by prescription, and those which are not. All the writers agree in making this assertion, but only a few explain its meaning in the sense in which we understand it. For we can speak of custom of fact only and custom of law only.

Custom is divided into customs which are and those which are not validated by prescription.

With reference to the first of these the truth of our proposition is self-evident. The aforesaid last chapter [*Decretals*, Bk. I, tit. iv, chap. xi] indicates this sufficiently, in the words, 'unless the custom has been validated by prescription according to law'; for these words clearly imply that there can be a custom that is not legally validated by prescription. Again, from the very fact that a prescriptive custom requires [for its introduction] a certain period of time, it will be clear that before the completion of this period, the custom will not have been validated by means of prescription; and yet it will still be a custom of a definite character. This does not mean that the custom in this latter case initiates law: it exists merely as a series of repeated acts.

With respect to those customs that initiate law, the meaning of

our assertion is that not only custom which has been validated by prescription, but also that which is not prescriptive can sometimes establish law. This is the sense of the assertion as I make it, as it was apparently that of Panormitanus when he said, (in commenting on *De Consuetudine*, Chap. xi), that a prescriptive custom is required by the canon law only when the custom is in opposition to law, but not, however, when the custom is outside law, his meaning being that in such a case a custom can initiate law, and this, even if the custom has not been itself validated by means of prescription. Panormitanus.

This view of Panormitanus seemed objectionable to Rochus (*De Consuetudine*, Sect. 3, no. 5), and for this reason, apparently, he did not admit the existence of a custom not validated by prescription, except inchoate and imperfect customs, which are not yet in the form in which they are able to establish law; or in the case of certain lines of conduct or customs of a few individuals, which practices are wont to be held up as examples for imitation, and are more accurately termed observances. Rochus (*ibid.*, Pref. no. 23) has a lengthy passage on this distinction. Rochus.

I understand the above assertion, however, in the sense in which I first stated it: for I think that a legal custom can exist, apart from prescription and from a definite determination of a certain period of time; an example of this kind being a custom which is created with the knowledge and toleration of the prince. This sort of custom initiates law, not after the manner of prescription, but in virtue of a tacit personal consent [of the prince], which consent can be sufficiently indicated by a non-prescriptive custom—as seems to be self-evident. In such a case, the opinion of Soto [Sect. 5] could be valid, an opinion which I attacked inasmuch as he spoke in general terms; and yet even with this limitation in respect of time required for a legal custom, it does not seem that the judgment should be left to the decision of a prudent individual but that some more certain rule will be necessary.[1] This point, however, I shall explain more conveniently in chapters xv and xvi.

A legal custom may exist independent of prescription, and of the determination of a definite period of time.

17. Finally, however, the question may be asked whether this division [of custom][2] in legal usage is analogical, [i.e. not a strict distinction,] in such wise that under the term custom in its absolute sense only prescriptive custom falls, whilst the term is applied to other kinds of custom only when they are adequately explained. This point has been touched upon by Abbas [, i.e. Panormitanus] (on *Decretals*, Bk. I, tit. vi, chap. 808 fifty, no. 9 [no. 4]), Giovanni d'Andrea, and Antonio de Butrio (on

What is the meaning of custom in the absolute sense?

Abbas. Giovanni d'Andrea. Antonio de Butrio.

[1] [In Section 5, Soto is cited as having held that no time is determined by law for the establishment of a legal custom.—Reviser.]

[2] [into customs validated or not validated by prescription.—Tr.]

the same chapter of the *Decretals*). Abbas holds that a custom absolutely so called in law ought, in a doubtful case, to be understood as meaning prescriptive custom. Baldus (*Consilia*, Bk. V, cons. 349, no. 20) inclines to the same opinion, and he is followed by Petrus de Ubaldis (*Super Canonica Episcopali et Parochiali*, Chap. v, no. 2 [no. 13]), by Rochus (*De Consuetudine*, Sect. 3, no. 1) who also cites Baldus (tit. *De Feudorum Cognitione*, Chap. i). Baldus here states that a custom which is not validated by prescription is no custom at all, but a mere will to establish the same.

Rochus.

These authors likewise maintain that this opinion can be proved best from the aforesaid chapter fifty [*Decretals*, Bk. I, tit. vi, chap. fifty]. At the beginning of that chapter, the condition there applied is referred to in these words: 'That the expression of the opinion of those who by law or custom ought not to be present should have no validity'; and later, at the end of the Chapter, we find the words, 'But it is not clear from this [, i.e. from the fact that they did elect,] that the right of election belongs to them by law or by prescriptive custom.' But I do not see how from these words it is to be inferred that the word 'custom', understood in its absolute sense, is to signify only a prescriptive custom. The conclusion seems rather to be, that the word 'custom' is of a general and indifferent character, and that it is for this reason that the words stating that the right has not been obtained by prescription were added in the response, in order to indicate that not any kind of custom, but only that which is prescriptive, could be sufficient for giving the right of election without a law [granting that right].

18. My opinion, then, is that if we keep in mind the true meaning of the word 'custom', we find that it is a general and indifferent term. This was the view held by Giovanni d'Andrea (on *Decretals*, Bk. III, tit. xxviii, chap. ix), and that also of Petrus de Ubaldis, as he records in the passage cited. It is that, also, of the Gloss (on *Sext*, Bk. I, tit. iv, chap. iv, word *consuetudo*), above cited, which refers to the opinions of other writers.

The proposition can be proved, whether we regard custom as one of fact or as unwritten law. First, a custom of fact, does not, of its nature, imply any limits in respect of a definite period of time, either long or short; and it is, therefore, not differentiated by reason of these variations of time. Nor do I find in the law a basis for the other interpretation, even if the word 'custom' is used in the law without a qualifying word. Again, as to custom embodying unwritten law established by a custom that of its nature does not require a determined period for its running, we find that it is law in the strict sense of the term, and that it is consistent with the proper definition of custom exactly as is a custom validated by prescription[1].

[1] [Reading *praescriptae* for *praescripta*.—Reviser.]

Accordingly, I do not see a basis for that general rule[1]; and this chiefly for the reason that all the laws which are cited by the aforesaid authors, deal with true prescription and not with consuetudinary law. Hence, wherever the word custom is used without a qualifying epithet, we must, I think, determine the nature of the custom there spoken of by a careful consideration of the subject-matter of the custom and of the kind of effect with which we are dealing. For, if that effect is such that it can be introduced only by prescription, or through a prescriptive custom, it will be clear that the intention of the author is to refer to a prescriptive custom; if, however, the matter does not demand a prescriptive custom, there is no ground for understanding the term in that restricted sense; rather, it is to be there read either as meaning custom without reference to a distinction in kind, or to custom other than prescriptive, the nature of which is clear from its own context, or from its closer application to other laws. Finally, the above-cited authors say virtually the same thing by reason of the limitations which they attach to their own rule, and by the laws which they cite in justification of these limitations.

CHAPTER IX

CONCERNING THE CAUSES OF CUSTOM AND IN PARTICULAR WHO CAN INTRODUCE IT

1. We have explained, so far as appeared necessary, the nature and essence of custom, both in general and in particular. It remains for us to explain its causes and effects.

The cause of a custom is explained.

First, as to the causes. Almost all of these have been touched upon in explaining the definition and divisions of custom and only its efficient cause remains to be more fully explained.

For in the case of custom, there is no question of any special matter and form of which it is composed; but in so far as the custom is a juridical entity, the matter with which it deals is the same as that of written human law. The written law and unwritten law differ not in the matter with which they deal, but only in the mode of expression employed in their institution. Hence, in consuetudinary law, there is no special form, sensible and external, except the actions [constituting the custom], which must be external and sensible, and these, in so far as they are tokens of consent, may be called the unwritten words by which this kind of law is engraved upon the memory of men. Consequently, no special promulgation is required in this form of law, because custom, through the usage itself, is its own public manifestation and promulgation.

[1] [The rule stated in the opinion of Abbas [, i.e. Panormitanus], laid down near the beginning of Section 17, *supra*, p. 517.—Tr.]

The intrinsic form,[1] however, of this branch of law, is a certain 'will'—which under another aspect is the efficient cause of the obligation created by the custom. Of this we shall speak in a moment. If, however, we consider a custom merely as fact, the matter which constitutes it is the acts themselves in the frequency of which the custom consists. And since the custom should be useful and morally good, its form (as it were) will be its moral goodness and the usefulness in the 809
single acts that make it up, and in their repetition; or, at least, the continuity or uninterrupted repetition of the actions for a sufficient time, can be said to be (as it were) its form. All these elements of custom are in some way connected with its sufficient[2] cause, and we shall discuss them more at length when we come to deal with that.

The final cause of custom, however, is, with due proportion, the same as that of written law, namely, the public utility, or that factor of the custom which makes it morally good; this element, objectively regarded, has the character of purpose, and [as such], in part at least, will be identical with the effects of custom. I shall discuss this cause at greater length in connexion with these effects. The efficient cause, then, is the only one needing elucidation.

The efficient cause of custom is twofold.

2. It is possible, however, at this point, to distinguish proximate and primary, among human causes, for it is of these that we are treating. The proximate cause, I term the men themselves who introduce the customs, for they inaugurate and continue a usage by their acts, thus producing the custom. I name as the primary cause, however, the sovereign power, or the prince if, by chance, his authority is necessary to give force to the custom. Whence the first of these two causes is called the proximate, especially in reference to a custom of fact, for the reason that it effects the custom directly and immediately. Of custom as law, however, the prince is the principal cause. He may also be called the immediate cause by reason of the immediacy of the law-making power exercised, even though he may not be such by reason of the immediacy of his personal agency, as is evident.

Baldus.

Three things must be borne in mind with respect to the proximate cause: the agent, the external action or the frequency of the action, and the internal will or consent. Baldus noted this, as cited in the last Chapter [*supra*, Chap. viii] and added a fourth element—time. This latter is not, however, a cause, but at most is a requisite condition. On this point, we have said something in the preceding Chapter, and we shall discuss it more specifically in those that follow. We must, then, here offer a brief explanation of these three elements [of a proximate cause].

[1] [That is, the formal element which makes custom law.—Reviser.]
[2] [*sufficientis*. Suárez probably intended to write *efficientis* (efficient).—Tr.]

A perfect community is necessary for the establishment of a custom.

3. Concerning the first of these [, i.e. the agent], the question is raised: who is capable of introducing custom? In the first place, all maintain that a private person is not adequate therefor; but that a perfect community is required. This is sufficiently evident from the considerations brought forward in the Second Chapter of this Book, on the second division of custom, in which the proof of this point is given. This doctrine is excellently stated in *Digest*, I. iii. 32.

4. An objection, however, may be made, based on the fact that sometimes a private individual or a private community may, by means of a custom, acquire a privilege—as will be pointed out in the following Book.[1] But a privilege is a kind of law and private legal rule. [Therefore, . . .]. Again, it is possible for a person, by virtue of a private custom, to be exempt from a legal obligation. Therefore, such a custom is a legal one. The antecedent of this last proof is evident from the fact that in the correction of his subjects, a bishop is bound by common law to proceed after seeking the advice of his chapter, and yet by custom he can be excused from so doing, as appears in *Sext*, Bk. I, tit. iv, chap. iii. This rule is also derived from *Sext*, Bk. II, tit. xiii, chap. i, where we find the words: 'Since the common law establishes a contrary rule [. . .]'. And this can be proved also, from the reason that the law can be thus annulled only in part, which annulment is called derogation of law (*Digest*, L. xvi. 102). Therefore, by the custom of one person a derogation may be made from the law, at least in regard to the person in question.

5. My reply first of all to the first portion of the argument just set forth, is that we are not here concerned with a privilege, which is a private written law, but with law that is unwritten, and which possesses a true legal character. Moreover, I maintain that a privilege is acquired rather through a prescription properly so-called than by means of a true custom of the sort we are here discussing, as we shall see in the next Book.[1] For it is evident that a prescription is introduced by a private person and by a private usage or custom.

A private custom could exempt from common law in two ways.

Our reply then to the second part of the above contention is that there are only two ways in which a private custom could exempt from an obligation of a common law.[2] In one way, by the obtaining of a prescriptive right through it, the acquisition of which may change the matter of the common law, and consequently may terminate the obligation of that law. Thus, a private custom can exempt, or rather remove the obligation of the common law from a certain person; for there is here no derogation from the common law, but an abolition of

[1] [Not included in these *Selections*.—Tr.]
[2] [Reading *excusare* for *excusari*.—Reviser.]

its subject-matter.[1] This may occur even in the natural law through a change of circumstances, as has been frequently stated, and it is a known fact even in prescription. This is the case with the laws cited above, as is clear from the language of the laws themselves.

In the second way, private custom might be conceived *per se* and directly as derogating from the common law by withdrawal from its obligation, but this we maintain is impossible, because a private custom of violating even a positive statute never excuses the fault; on the contrary, it normally rather increases it. And this is the meaning of the laws when they say that no prescription can be established in opposition to rightful obedience, as is clear from the *Decretals* (Bk. II, tit. xxvi, chap. xii), on which the same doctrine is noted by the Gloss. It is held likewise by other commentators on that Chapter, on the principle that no person can be exempt from due obedience by means of his disobedience; nor may one through abuses of his own derogate from the power of a superior, or in any other way diminish that power. Thus, the Doctors also assert that a subject cannot depart from a precept or the wish of his superior, because this act of its nature is a fault of disobedience.[2] On this point, Archidiaconus (on *Sext*, Bk. III, tit. iv, chap. v) may be consulted, and also Felinus (on *Decretals*, Bk. I, tit. ii, chap. viii, no. 30, words *quarto limita*).

Gloss. 810

It is not, then, possible for an individual subject to exempt himself from a law by means of his own evil custom. Whence, the fact that a derogation from the law can be partially made by one having the legal power so to do, does not imply that an individual subject, who does not possess such power, can do so; nor is it presumed that a superior has granted the subject a dispensation (as it were) on the ground of his abuse, because a will that would have the effect of weakening discipline would be an unreasonable one, and contrary also to the force and efficacy of all law.

6. Our second assertion here is that a legal custom can be introduced not by any community whatever, but only by one possessing the capacity for legislative authority over itself; or, at least, by a community of sufficient perfection to be the subject of law properly so-called.

By what community the introduction of a legal custom is possible.

This assertion is the commonly accepted one on the point that a perfect community is required for the introduction of a custom: a state, for instance, or a similar community. This conclusion may be drawn from the aforesaid law 32 [*Digest*, I. iii. 32, § 1], where is first stated the principle that an ancient custom has the force of law, and then is added a statement of the ground in reason for the principle,

[1] [Reading *ablatio* for *oblatio*.—Reviser.]
[2] [Reading *inobedientiae* for *obedientiae*—Reviser.]

namely, that the laws themselves derive their force from the fact that they have been accepted by the judgment of the people: the same, therefore, must be said of those unwritten laws of which the people have approved. The reference here is clearly to a perfect community and one having from its first establishment the inherent power to make its own laws. In law 35 [*Digest*, *ibid.*, 35] there is added the clause that 'a custom is introduced by the tacit agreement of the citizens': but the citizens constitute the state; and a state is a perfect community. In law 37 [*ibid.*, 37] such a custom is called a law of the state. The same is laid down in the *Institutes* (I. ii, § 9, and following sections).

7. Whence the assertion is made by the Doctors generally, that only a people which possesses legislative authority can introduce a custom. This statement is made by Bartolus, Jason and others, in commenting on *Digest* (*ibid.*, 32). It is made by Panormitanus, Rochus and others (*De Consuetudine*, Chap. xi). Innocent (on *Decretals*, Bk I, tit. ii, chap. xii), Felinus (on *Decretals*, *ibid.*, chap. vii, no. 25 and on *ibid.*, Bk. II, tit. xxvi, chap. xi) and Navarrus (Comment. *De Spoliis*, Sect. 14, no. 7)—all hold this opinion. The names of other writers who follow this doctrine are set down by Tiraqueau (*De Iure Primogenitorum*, Qu. 16).

Bartolus. Jason. Panormitanus. Rochus. Innocent. Felinus. Navarrus. Tiraqueau.

Giovanni d'Andrea, for this reason, puts it in the definition of custom (*De Consuetudine*, Chap. xi), that it should be the law of a people which by public authority has power to enact law. Barbatia [*Repertorium*, *De Consuetudine*, No. 9] and others, including Angelus de Clavasio (*Summa*, word *consuetudo*, No. 7), agree with this statement. The latter says that for custom there is required a people competent to enact law. Sylvester ([word *consuetudo*,] Qu. 3) states this doctrine very clearly, but St. Thomas does so even more satisfactorily when he says (in I.–II, qu. 97, art. 3, ad 3) that a community by which a custom can be introduced, should be either a free commonwealth, that is, one possessing sovereign power; or, if it is not a sovereign community, it should have that power by virtue of the tacit consent of the prince to whom it owes allegiance. Accordingly, I chose my words advisedly when I said that there was required a community 'which has the capacity for legislative authority', because it is not necessary that it be in actual possession of this power, for this can be supplied through the permission or tacit consent of the prince. The capacity, however, for such active power is necessary, because it should be a perfect community; but every perfect community, as was stated, has an inherent capacity for such power.

Giovanni d'Andrea. Barbatia. Angelus de Clavasio. Sylvester. St. Thomas.

8. Panormitanus (*De Consuetudine*, No. 1), develops an objection to this doctrine from the fact that a community of clerics is able to establish a custom opposed to the canons, according to the *Decretals*,

Panormitanus.

(Bk. I, tit. IV, chap. xi), and yet is not able to enact a law contrary to the canons (*Decretum*, Pt. II, causa XXV, qu. ii, can. vii, and other similar canons). He therefore concludes that [legal] custom can be established by a body that does not possess the power of making laws.

We can urge a second objection to the same effect, namely, that a community of lay persons cannot make a law of the Church, as is self-evident, and yet by means of a custom of their own, they may establish a law of the Church, such as a law of fasting, or of the observance of some feast. Again, a community of merchants has not power to make law, yet a custom of theirs can establish a legal rule, as is clear from the observations of Bartolus and others (on *Code*, IV. xviii. 2). Furthermore, women are not able, in the common opinion of writers on the subject, to enact laws; yet a community of women can, through their own custom, introduce a legal rule, as in the case of an institute of nuns. This is the opinion of Bartolus (on *Digest*, I. iii. 32 and on *Code*, VIII. lii. 2). Moreover, many authorities, whom Tiraqueau refers to in *De Iure Primogenitorum* (Qu. 16), say that the custom of one family can make a law for that family, although it has no legislative power.

Bartolus.

Bartolus.

Tiraqueau.

9. On account of the first objection given above, Panormitanus (tit. *De Consuetudine*, No. 8) rejects the aforesaid definition of Giovanni d'Andrea. Yet an answer to Panormitanus's objection is easily made: in the first place, a clerical community has power to make a law, at least, one not opposed to the canons, and this is enough to give them authority to introduce a custom, and hence, consuetudinary law. Nor is it a difficulty against our doctrine that a clerical community actually have more extensive power to introduce law through custom, than by means of statutes, since it could have that power by special grant of the law and of the Popes—and this for the special reason which is examined by Abbas [, i.e. Panormitanus,] (*ibid.*, Chap. xi, no. 8), by Rochus (*De Consuetudine*, Chap. xi, sect. 3, no. 9) and by other writers on that same Chapter. It is, nevertheless, always true that no custom is introduced, save by one having legislative power. This matter is better explained by the doctrine stated above: it is not necessary that a community be in actual possession of legislative power, but it suffices that it have the capacity for such power. However, this capacity is truly possessed by a clerical community; for the power of enacting statutes contrary to the canons could be given to it, even if the grant has not actually been made.

The answer to the objection.

Abbas.

Rochus.

10. But in that case, a second objection presents itself, namely, that which is based upon the fact that a community of laymen has no capacity to enact a written law of

An objection.

the Church. The first answer to this can be found in my statements in the treatise *De Voto*, Bk. IV, chap. IX:[1] namely, a community of the people, practically,[2] and if we regard only the nature of the case, is capable of legislative power, even in matters of religion and of divine worship; and therefore, even though this power has at present in the Church been raised to a higher order and committed to the rulers of the Church, the people are, nevertheless, permitted by the consent of these prelates to bind themselves in matters of that kind through their own customs, with the tacit assent of their prelates, in the manner which we shall explain in the following Chapter.

The answer.

Another reply may be given, namely, that it is sufficient that this community constitute a perfect society, and have of itself a passive capacity for such a law, so as to possess the power of originating a law in a spiritual matter through custom which has the consent, tacit or expressed, of its spiritual superiors. It was to indicate this fact that I included in my assertion these last words: 'or at least that it be such a community as can be the subject of law properly so-called'. For, a twofold capacity may be considered to reside in a community, one to make law, another to receive law. Although at present their earlier power to make ecclesiastical laws does not exist among Christian lay people, nor perhaps, even a capacity to do so, at least according to ordinary law; nevertheless, the laity has a passive capacity—that is, the capacity for receiving such law—and this capacity, I say, is necessary and sufficient, in order that by the custom of such a community, with the tacit consent of its prelate, [legal] custom may be introduced. I say that this capacity is necessary: for no form can be introduced except in matter capable of receiving it; so also the law of a spiritual custom (so to speak) cannot be introduced in its own way except in a subject with a capacity to receive ecclesiastical law. I say that is sufficient, for it is enough that the community be considered as in some way complete and perfect in a particular order: for a community entirely imperfect and restricted has no capacity for law strictly so called, although it can be the subject of a precept, as I have shown in Chapter IX of Book I.[3] But in every perfect community, custom is sufficient for introducing law, if the consent of the ruler is given for the custom.

A twofold [legal] capacity may reside in a community.

11. The answer to the third objection is now clear. For a community of merchants, for instance, can introduce custom in proportion to its capacity for law. Bartolus (on *Code*, IV. xviii. 2) says, that it can enact statutes. On the interpretation that must be given to this remark, I have spoken in

The answer to the third objection.

Bartolus.

[1] [Not included in these *Selections*.—Tr.]

[2] [In other words: 'as far as the people are concerned, i.e. they are members of the Church and could be given the power'.—Reviser.]

[3] [This is found in Chap. vi. of Book I, *supra*, pp. 73 *et seq.*—Tr.]

Book III.[1] For if that body of merchants be regarded in itself, it has the power to frame conventional statutes[2] only, but not true laws. If, however, it be regarded as united with the prince or as wielding authority granted by him, this merchant body has power to frame statutes of a quasi-municipal character. Hence, it can establish custom, which has, with the same limitations, the force of law.

This seems the evident conclusion to be drawn from the *Code* (VIII. lii. 3), where at the beginning, the Emperor [Justinian] makes the unqualified assertion that an approved custom tenaciously preserved, resembles a law: words that can have application only to a people possessed of the power of making law. He adds immediately, 'and what is known to have been observed by offices, courts, cities, or corporate bodies'—of course, with the consent of the prince, as the Gloss there states. Hence, it is sufficient that a community possess legal capacity, 'together with the tacit consent of the Prince or Prelate'.

Gloss. 812

The fourth objection is refuted in the same way: for, a community of women can have a capacity for law, and so a custom among them, accepted by the prelate, can establish law. This is the express teaching of Bartolus (on *Code*, VIII. lii. 2, no. 13).

Solution of the fourth objection.

Bartolus.

The answer to the last objection is that the statement there quoted[3] is false; for a private family cannot establish a true legal custom, since of itself it is essentially without legal capacity, even of a merely passive kind. The reason is that it is a wholly imperfect community, and can never by its own customs introduce a legal rule, even with the consent of the prince. A family as such, and apart from its social relations, has no capacity for law, not even for law imposed upon it by the prince—as I have stated in Chapter ix of Book I.[4] Nor, again, can a family introduce a custom applicable to others, because the custom of one is not binding upon another; nor can it be presumed that it is the will of the prince to bind a perfect community because of the custom of an imperfect portion thereof, as we shall explain in discussing the point next to be taken up. In what manner this principle is relevant to the question of custom abrogating law, will be easily explained in view of this last consideration.

Answer to the last objection.

12. The third principal assertion in this Chapter is the following: For a custom to be established by the people, it is necessary that it be observed by at least the greater part of the community; and such observance is sufficient. This proposition is accepted by all the authorities to whom I have made reference. A full treatment of it is to be found in Bartolus

In order that a custom may be established, it is necessary that it be observed by at least the greater part of the community, and this is sufficient.

Bartolus.

[1] [Chap. iii, *supra*, p. 377.—Tr.]
[2] [That is, statutes which regulate the convention that rule in the merchant body.—Reviser.]
[3] [*Vide* the last sentence of Sec. 8, *supra*, p. 524.—Tr.]
[4] [*Supra*, p. 105.—Tr.]

(on *Code*, *ibid.*, no. 12) and in Rochus (*De Consuetudine*, Sect. 4, from no. 2).

Rochus.

The proof of the first part of this assertion is that the source of a custom ought to be practically the whole community, inasmuch as its custom applies to all; that of the smaller portion of the community is not sufficient for the custom to be imputed without qualification to the community as a whole, or for it to carry with it the consent of the community. Again, for the enactment of a law through the express will of the community, the consent of a minority is not sufficient; nor is it sufficient in elections, and in other acts, which ordinarily are done or can be done by the community as a whole: much less, then, will it suffice for establishing legal custom.

An objection.

The solution.

One may object that this rule is to the point, where the consent of the whole community is the real cause of the law, but not so, where the law is established by means of a custom with the consent of the prince. I answer that we must determine whether it is of the express or of the tacit consent of the prince that we are here speaking. If we speak of his express will, then it is true that the prince can enact law, if he so choose, which has regard for the custom of a few persons only, if this seems to him better or more expedient: this, however, will be not consuetudinary law, but rather a written law, or one expressly enacted. If, by the consent of the prince, we here mean tacit consent, then this cannot be reasonably presumed solely on the ground of a custom observed by the smaller portion of a community, even if it has been adequately tolerated: and this, both for the reason that the presumption is not based upon any law, and because the prince is not to be considered as desiring through such an unwritten law to force the consent of a people who do not consent. Rather, the prince is held to give his tacit consent—other conditions having been fulfilled—because the people give theirs and tacitly petition his own. But[1] the consent of a minority in the community is not that of the people as a whole. Therefore, . . .

13. The second part of the third assertion, namely, that the usage of the larger portion of the community is sufficient for the establishment of custom, is based upon the converse reason: namely, that in every community the consent of a majority thereof is usually sufficient for the validity of its acts in matters where law has not made some special provision [to the contrary]. Thus, in the case of a corporate body, the consent of the major part is held to be that of the whole body. This principle is set forth in the *Digest* (L. i. 19). Felinus, too (on *Decretals*, Bk. I, tit. 11, chap. vi, no. 17), has noted this, adducing many examples. We, also, have already touched upon this point in earlier passages. Therefore, in the present case, the custom of the greater

Felinus.

[1] [Reading *at* instead of *ut*.—Reviser.]

part of the community is to be held as that of the whole community, and hence, this is sufficient.

Almost all the authorities cited above are of this opinion, for they require [for the introduction of custom] no more than this [consent of the majority]. How such consent of a majority is sufficient for a custom in derogation of law, I shall discuss in Chapter xvi. Angelus de Clavasio, indeed, adds (*Summa*, on word *consuetudo*, no. 7) that in that case it is necessary for two-thirds of the community to give their consent. He cites the *Digest* (III. iv. 3 and 4); and accepts the opinion of Panormitanus (*De Consuetudine*, Chap. xi, no. 18), who treats this question at some length.

Angelus de Clavasio.

Panormitanus.

But however the matter is explained, the restriction made, is not necessary in the present case. For if it means that two-thirds of the people should give their consent, and should observe the custom, then this statement is not true, since it is based upon no law. For in the laws just cited, there is no statement to that effect, but only the statement that the presence of two-thirds of any community is necessary for its acts to be held as done in the name of that community. Indeed, the Gloss on those laws notes that the consent of the two-thirds who are present is not necessary, but that the consent of the majority of those present is sufficient. This principle is admitted by Panormitanus in respect of the matter under discussion; and in this sense he reads *Digest*, L. i. 19 and *Decretals*, Bk. III, tit. xi, chap. ii. If, however, that assertion means no more than that the presence of two-thirds of the community is necessary, the requirement would seem to be a superfluous one in the case of a popular custom, since it is obvious that when a custom is a long-continued one, almost the whole of the population is necessarily present.

Gloss.

Panormitanus. 813

Panormitanus.

14. Panormitanus has for this reason added the note that 'it is necessary that at least two-thirds of the community be aware of the custom which is introduced'. But this has rather to do with the other conditions which are requisite with respect to the consuetudinary actions, namely, that they be publicly performed. The necessary consequence of such performance is that if the custom is thus publicly observed by the greater portion of the community, not only that portion of the community, but others also, will have a knowledge of it. However, so general a knowledge of the custom is not essential; for, even though many may be ignorant of it, so long as that custom is known to the larger part of the community, this is sufficient. The reason is that the consent of those who are thus ignorant of it is not necessary, nor is even a knowledge of the custom on their part called for: it is sufficient that this custom be of itself a public one.

It is for this reason that Rochus (*De Consuetudine*, Chap. xi, sect. 4, no. 24 [no. 2]) said that a knowledge of the custom by the people, or by a majority of them, is requisite for the validity of a custom. He discusses

this point thoroughly, and strengthens it [by citing authorities]. Gregory López ([on *Las Siete Partidas*,] Pt. I, tit. ii, law 5, gloss 4 [gloss 3]) who is followed by Burgos de Paz (in Law I: *Tauri.*, no. 205), agrees with this view, saying that in a custom observed by the greater portion of the people, there is always a sufficient representation of the whole people, and that the ignorance of it, on the part of some, cannot set up a barrier to its introduction.

Gregory López. Gloss. Burgos de Paz.

It remains that we explain in what manner the computation of this greater portion should be made, or of what persons it must be composed. There is a general agreement on this point, that there should be reckoned in this number only persons who can give consent to consuetudinary law. All infants and all persons mentally defective are therefore excluded. Some would also entirely exclude women on the ground that they can exercise no legislative authority. Among men, they exclude all below the age of twenty-five years. However, I cannot find any basis in law or any justification in reason for the exclusion of the last two groups. This question, however, will be better settled when we come to consider the separate effects of law.

How the reckoning of the 'majority' is to be made.

CHAPTER X

BY WHAT ACTS CUSTOM IS INTRODUCED

1. The assertion of this Chapter is, briefly, that a custom is not introduced except by a repetition of public and voluntary acts, and for the reason that the consent of the people is necessary for the establishment of a custom.

That custom is introduced by repeated actions would seem to be an assertion not requiring proof. First, as to a custom of fact: the custom is essentially nothing more than a repetition of actions; this has been made clear above; and therefore, with respect to such a custom, even though the single actions may be said to be the efficient cause of it, nevertheless, the repetition of or the sum of the acts would rather seem to be the essence of it, and (as it were) its formal element. Then, with respect to custom as law, it is to be remarked that such custom is introduced by one of fact, and hence it also must be initiated through a like repetition of acts. This part, then, of our proposition would seem to be sufficiently established by the fact that by definition, a custom should be instituted by the general conduct of those who employ it. But general conduct arises from the repetition of certain actions by the people.

Custom is established by a repetition of public and voluntary acts.

This part of our proposition may also be proved from the word *consuetudo* (custom): for 'custom' is so called because, as Isidore says

(*Decretum*, Pt. I, dist. 1, can. v), it is usage in common. But how can it be common usage except through a repetition of actions? Likewise, a custom is termed long-continued usage (*Decretum*, Pt. I, dist. XI, can. iv, and *Digest*, I. iii. 35). Again (*ibid.*, 32) the people are spoken of as having declared their will by the language of deeds in a custom. But deeds do not exist except by repetition of acts, and this repetition we call 'frequency'. Therefore, . . .

2. It may be objected, indeed, that at times a mere omission of an action is sufficient to introduce a custom. I have already pointed out, however, that a moral omission is included under the heading moral acts, and that wherever such omission is sufficient, then a repetition of such omissions is also necessary. When and in what way such omission suffices for establishing custom we shall see in Chapter xvi.

First objection.

Secondly, one may object that it is asserted by Doctors of high authority that a single action is sometimes sufficient for introducing a custom, as Bartolus notes (on *Digest*, I. iii. 32 and on *Code*, VIII. lii. 2). Panormitanus (*De Consuetudine*, Chap. xi, no. 17), also accepts this doctrine, with respect to an action that is of its nature permanent in the sense that the act continues in its effect, and endures for sufficient time; thus, by the one bestowal of a benefice, a custom is established in that bestowal, if it has endured in point of fact for a sufficient time (on *Sext*, Bk. III, tit. IV, chap. v). He notes again that by the one act of building a bridge, a [legal] right is acquired, when the bridge has stood for a sufficient time.

Bartolus. **Panormitanus.** **Second objection.**

However, these and similar examples are matters of prescription, for which indeed, a particular act consisting of a human operation is not *per se* essential; an habitual possession, if I may use the word, is sufficient, 814 together with the fulfilment of the other conditions. The reason is that more commonly, prescription is concerned with persons or things—as has been sufficiently touched upon in the first and second Chapters of this Book—and hence, when a single action is sufficient [to establish a right of prescription], what continues is not the act itself, but its effect or term: the possession of the benefice, for instance, or [continued existence] of the bridge.

Still, the element of frequency of using the bridge or holding the benefice is morally present in these examples and the like. But in custom of the kind of which we are now treating, and generally in custom which has as its matter human acts as such, it is impossible for the custom to be introduced without a multitude and frequency of actions, for the reason that those separate actions do not by themselves endure for a long period of time, and custom should be a protracted [usage]. Whence it is impossible that the custom should be such [, i.e. protracted], except through a succession of actions.

One may object that although the individual action is transitory, it may be held to endure morally, so long as it is not revoked, even if it is not repeated.

Objection.

My reply is that this holds true of guilt or continual[1] fault, but not of a custom: for no one is said to observe a custom of stealing merely because he stole upon one occasion, and did not make restitution for a long time thereafter. This principle is especially true because, in the matter of initiating or revoking a law, it is not possible that the people who have performed one act of keeping some feast-day or a fast, for example, should go on for a long time without performing either similar acts, or contrary acts. Therefore, it is true absolutely and without qualification, that for a custom, a frequency of actions is required. Bartolus, in his remarks (on *Code*, VIII. lii. 2, no. 12), sets forth this opinion at some length, as does also the Gloss (on *Decretum*, Pt. I, dist. 1, can. v, and on *Decretals*, Bk. I, tit. IV, chap. xi), on which Rochus, treating the matter at length (*De Consuetudine*, Sect. 5 [Sect. 4], no. 36), says that this doctrine is generally received with hardly any dissent.

Solution. **Bartolus.** **Gloss.** **Rochus.**

3. Furthermore, these Doctors raise a question as to what frequency of actions is necessary or sufficient for the establishment of a custom of this character. For certain early jurists said that two actions are enough. Bartolus, in the passage cited above, notes this opinion, and he is followed in Rosella[2] (word *consuetudo*) and by Sylvester (word *consuetudo*, Qu. 4 [Qu. 3]), who accept the opinion but make certain distinctions. These writers cite the *Code* (I. iv. 3) and the *Decretum* (Pt. II, causa XXV, qu. ii, can. XXV), in which they call one repetition of the same criminal act, 'a custom'. But, as Bartolus has rightly said, the word 'custom' must there be understood as meaning a certain usual mode of action, such as is sufficient not for the introduction of a law, but only for the justification of a heavier punishment, and for the prevention of a too facile grant of pardon, and similar effects of fact, rather than of law. Hence, Bartolus and others generally reject this opinion, since no criterion can be found for fixing a definite number, nor do the laws prescribe one. Whence they assert that the matter is to be left to the decision of a prudent judge.

What frequency of actions is required for the establishment of custom. **Bartolus.** **Rosella.** **Sylvester.** **Bartolus.**

This opinion of these writers seems to me certain, when it is applied to our subject-matter of legal custom strictly so called, whatever may be the number of acts necessary to establish a true prescription or other effects of 'fact', so to speak.

One should have recourse to the judgment of a prudent man.

[1] [Suárez is here using the word *habitualem* in the sense of persisting, not in that 'of frequently taking place'.—Reviser.]

[2] [*Summa Rosella* of Baptista Trovamala.—Tr.]

4. The matter may be made clear as follows. Sometimes the custom of which we are speaking must, in order to initiate or abrogate law, be validated by prescription; at other times, that is not necessary. When, therefore, validation of the custom by prescription is called for, the first consideration must be the number of years required therefor, according to the principles we shall lay down in the following Chapters. Attention must then be directed to the question whether, in the successive years, the custom requires one act only or many acts: for, if it requires only one, as in the observance of a certain feast, or of fasting on a particular day, then as many acts are necessary as the number of years required for the running of the prescriptive period. If, however, the custom requires many acts in a fixed number of years, then the number of actions will be proportionate with the number of years necessary for the prescription. It is possible, however, that the number of actions in the successive years may be not an absolutely definite one, but subject to some condition or occasion—as the custom of public prayer, or other like exercise, may find place only upon such and such an occasion or in response to the need of the moment. Thus, the number and frequency of the occasions will indicate the required frequency of the actions—done at the time they are called for, and with no omission of the act on those occasions.

Likewise, in respect of a community, these actions are to be taken as one act, in so far as the community acts either as one in the form of a corporate body or a college, as in electing or ordaining[1] or the like; or, as the whole body or the greater part thereof concur in the action, although each person acts upon his own account, as in observing a feast, or a fast, &c. Therefore, in cases where the whole community participates, few actions are required. For they are multiplied in virtue of the separate actions of the observance of the custom: and this, not only in proportion to the magnitude of the population—in the great numbers of actions which are done at the same time by all the members of the community—but also in proportion to the length of time during which custom is observed, that is, the repetition of those actions on successive occasions by the individuals.

But when there is no requirement of a definite continuity of time, 815 then, just as the length of the period within which the custom must be continued is an arbitrary one, so also is the frequency of the actions, which will be fixed according to the exigencies of the subject-matter, or of the occasions for which the custom must be (as it were) sustained in observance.

Since, also, the custom in question requires the consent of the people and of the prince, such a multiplication of actions will be held

[1] [For *eligendo ordinando* read *eligendo, ordinando*.—Tr.]

sufficient as will make known the consent of the people and the tacit approval of the prince.

Hostiensis (in *Summa* [Bk. I, rubric iv, no. 5]) states the doctrine in much the same way—as do Archidiaconus (on *Sext*, Bk. I, tit. II, chap. i), Panormitanus (*De Consuetudine*, Chap. xi, no. 17) and Bartolus (on *Code*, VIII. lii. 2, no. 12). This doctrine is followed by other writers also. Hostiensis. Archidiaconus. Panormitanus. Bartolus.

Whether the same assertion holds true of style or custom of judicial acts, I shall discuss at the close of the following Chapter.

5. From the above discussion, it is evident that it is necessary that the observance of a custom be public, and consequently, that the customary actions be publicly performed: partly in order that all the people or a majority of them may unite in giving their consent to such a custom; and partly also, in order that the custom in question may, in so far as such public observance can do so, be made known to the prince whose consent also is needed. **Public observance of custom is necessary.**

An action, however, can be public in two ways, namely, in fact and in law: as an act is usually said to be notorious in a twofold sense, namely, with a notoriety of fact or law. **An act can be public in two ways.**

In the former manner, an act is notorious which, although it is the action of a private person and done on private authority, is yet performed publicly in the sight of other persons, and not furtively or in secret. In the latter manner, however, an act is termed a public one which is done by public authority and in a juridical fashion; for example, as the sentence of a judge, and the like. **What is publicity in fact and at law.**

When, therefore, a custom itself is one observed by private acts, it is certain that in order to establish a consuetudinary law, the acts must—for the reasons just given—be performed publicly, at least after the first-named manner, and with notoriety of fact. The reason is that actions done privily and in secret, indicate, by the fact that they are so done, that they are not performed with the consent of the people nor of the prince; and therefore, unless the acts be public, at least with the notoriety of fact of which we have spoken, they cannot be suitable for the establishment of a public custom. This condition is so stated in [*Las Siete Partidas*,] Pt. I, tit. ii, law 5.

CHAPTER XI

WHETHER JUDICIAL COGNIZANCE OF THE FREQUENCY OF ACTIONS IS REQUISITE FOR THE INTRODUCTION OF A CUSTOM

1. Our present Chapter seeks an answer to the question whether it is essential for the introduction of a custom that the sufficiency of the number of acts constituting it be defended or proved in court by the public authority.

Is judicial cognizance necessary for the introduction of a custom?

Some authorities assert that it is necessary that the custom be approved by legal decision in its favour.[1] This is the doctrine of the Gloss (on *Decretals*, Bk. I, tit. IV, chap. xi and on *Decretum*, Pt. I, dist. VIII, can. vii; on *Institutes*, I. ii. 9, word *diuturni*), and in the Gloss (on rubric to *Code*, VIII. lii). It is followed by St. Antoninus ([*Summa Theologica,*] Pt. I, tit. xvi, § 4).

Gloss. Gloss. St. Antoninus.

This doctrine is founded first, upon *Decretals*, Bk. V, tit. XL, chap. XXV, where a certain custom is alleged to be insufficient, because it was not established by a decision in its favour when impugned. This is noted by the Gloss on that Chapter, which cites in confirmation, the example of a prescription for the validity of which an appeal is necessary, according to the *Digest* (VIII. vi. 18, § 2). 'Thus it would seem,' says the Gloss, 'that it [, i.e. an appeal,] is required in a custom validated by prescription.'

Secondly, the *Digest* (I. iii. 34) is cited in favour of this opinion. That law states that when a custom is cited as proof, the first point to be examined, is 'whether that custom also has been confirmed when impugned'.

Thirdly, this view is favoured by the law of Spain ([*Las Siete Partidas,*] Pt. I, tit. II, law 5), which holds that a custom of ten or twenty years' standing must be observed in the future if, during that period, judgment has been given in accordance with that same custom.

Fourthly, the proof may be added that, until the custom has thus been confirmed, it cannot become sufficiently known and of a public character suitable for its observance to become binding upon other persons, or for it to give a peaceful conscience to those observing it.

Thus, if one asks how many judicial acts are necessary to establish a custom, the answer of the Glosses is that a reaffirmed judgment in conformity with and approving the custom is necessary. The sole proof of this opinion is derived from the *Code* (I. iv. 3).

[1] [i.e. 'custom proved by a judicial decree after it had been disputed' (*Contradictorio judicio*). This term is explained by Panormitanus, in his Commentary *De Consuetudine*, Chap. xi (p. 124 of the Venice edition, 1569). The term means that a judicial decision is given in favour of a custom which has been challenged by a plaintiff. His words are: '*Quod parte contradicente, vel semel saltem fuerit judicatum consuetudinem esse.*'—REVISER.]

2.[1] This opinion, however, is false, and the contrary view is the common one among the canonists and the jurists,[2] as is stated by Abbas [, i.e. Panormitanus,] (*De Consuetudine*, Chap. xi, no. 16), and also by Bartolus (on *Code*, VIII. lii. 2 and on *Digest*, I. iii. 32 in *Repetition*, qu. 2). Jason states the same opinion in his comment on the same law (on *Code*, VIII. lii. 2, and on *Digest*, I. iii. 32, no. 51, col. 12), as does Rochus (*De Consuetudine*, Sect. 4, no. 34), where he gives the names of other writers who teach the same doctrine. Gregory López sets forth this view (on *Las Siete Partidas*, Pt. I, tit. II, law 5, *glossa* c), 816 as does Peter de Salazar (*De Consuetudine*, Bk. I, chap. vii).

A judicial act is not necessary for the introduction of custom.

Abbas. Bartolus. Jason. Rochus. Gregory López. Peter de Salazar.

The first proof of our assertion is that custom does not require for its establishment such a judicial act, either by reason of its nature or from the obligation of positive law: there is, therefore, no ground on which such an act is necessary.

The general inference of this argumentation is clear: every condition or cause requisite for a custom ought to be based upon some law; otherwise, the assertion of such a condition or cause as an essential one is gratuitous and unfounded.

The proof of the major premiss is derived, first, from the fact that there is no reason in the nature of things why such a judicial act should be necessary. For, as Bartolus says, the general consent of the people, or a greater part thereof, sufficiently manifests popular consent; and the public usage, as such, can of itself be known to the prince, so that his tacit consent may be assumed. Hence, there is no reason why a judicial act should, from the nature of the case, be necessary. As to the second member of our premiss, the positive laws which speak of custom that is reasonable, never require this condition [of a judicial act], but only that it be of a prescriptive, immemorial, or of an ancient character, and the like. This is clear from the *Decretals* (Bk. I, tit. IV, chap. xi) and the *Digest* (I. iii. 32) and other laws of a similar nature.

Bartolus.

3. I offer as a second argument, one drawn from reason: this requirement of a judicial act for the establishment of the custom supposes that it has been impugned in the courts: what, however, if in fact the custom is never impugned? If it were not thus challenged, its establishment could never be effected. But that is contrary to all law and to all reason.

It may be said [in reply to this argument] that the custom is not confirmed in a space of ten or twenty years only, if it had not been put to the test of trial in which it was impugned, yet, if the custom lasts for a longer period, say for thirty years or more, then such lapse of time makes up for the required judicial actions. It is the opinion of

[1] [Figure 2 is omitted in Latin text.—TR.]
[2] [Reading in *legistarum* for *legislatorum*.—REVISER.]

Burgos de Paz. Burgos de Paz (Law I, *Tauri.*, no. 247) that this holds true, at least in Spanish law. But with respect to the common law, this view is untenable, since according to that law a custom of ten years' standing is held to be ancient, and for such a custom to be complete and perfect under the rules of that law, the condition [of a judicial act] is not necessary, as has been proved. Regarding the law of Spain on this point, I shall add a note shortly.

4. I shall add another argument, an excellent one, it seems to me, suggested by Panormitanus. It is that the aforesaid condition [of a second judicial act] involves a certain contradiction. For if a second decision in a trial where custom is impugned, is required, then, either it is impossible that a first just decision favouring the custom can be given, and thus the establishment [by it] of a perfect custom is made impossible, a proposition that our opponents do, of course, deny; or the [second] decision of the court supposes the custom to have been a perfect one before its decision was given—in which case, that decision is clearly not essential to the custom and at most does no more than record it.

The proof of the first member of the foregoing proposition is that, if a [second] judicial decision in favour of the custom is necessary for the establishment of the custom, then no custom can be complete before a first decision is given, since a condition necessary to its perfection is lacking. Yet, such a first decision cannot, therefore, declare the custom be complete; or that an action done in virtue of the custom is valid and permissible; or, finally, that the custom can establish any obligation. The reason is that such a decision must contain error in defiance of the plain truth, even though from the standpoint of those who demand a second judicial declaration, the custom was not a custom before that first decision was given.

From this reasoning, the second member of our proposition also is clear: for, if the custom is truly and justly declared by the court [in a second decision] to be a perfect one, then it was perfect before the declaration. The judicial decision in question does not complete the custom, but merely declares what it is.

5. The reply to the first statement contrary to our thesis,[1] that drawn from the *Decretals* (Bk. V, tit. XL, chap. XXV) is, first, that this law has reference not to a legal custom, but to a prescription of a right of election, which is a very different matter. As to that, the matter can be open to dispute, but upon it no proof applicable to our present subject can be based. In the second place, the words in the *Decretals* (*ibid.*) here referred to are not found in the decision, but in the allegation of the party against whom the case was settled, as is evident from the context. Thirdly, those words are interpolated not in order to suggest that a decision

Reply to the basis of the contrary position.

[1] [*Supra*, p. 534.—Tr.]

in favour of a prescriptive custom impugned is necessary for [the validity] thereof—for this is so clearly false, that it is improbable that this allegation was even put forward—but only to demonstrate that such a custom was not sufficiently proved from the evidence which the contesting party had brought forward.

Whence Panormitanus (on *Decretals*, *ibid.*, no. 13) says that the inference to be made from the text of the law is not that which our adversaries here have drawn from it, but rather its opposite. The example, however, which the Gloss brings forward (on *Digest*, VIII. vi. 18), has no bearing upon the present matter, because in that law the custom in question is not a legal custom, but one concerning a prescription of servitude; and, again, because a reference to that law in our present question is irrelevant, for it sets forth, not the manner of acquiring a servitude by prescription, but merely the manner in which the servitude is not lost. As to this latter point, it lays down the principle that the servitude is not lost through non-usage when there is no occasion for its use. The law holds that such non-user is a merely negative non-user and not privative in its effect, a point that we shall more fully
817 explain later in treating of the loss of privileges. Since sometimes, the occasion for the use [of the servitude] does not arise unless a certain previous conditional action takes place, the law makes it clear that prior to the occurrence of such an occasion the servitude is not lost merely on the ground of non-user. The principle has special application to urban servitudes as is shown from the *Digest* (VIII. ii. 6). From that law, therefore, nothing as to the necessity of a further challenge[1] of the prescription, especially in a court of law, can be inferred.

Panormitanus. Gloss.

6. My reply to the [second] contrary thesis based upon the *Digest* (I. iii. 34), is that this law makes simply the following assertion: for the examination and proof of a custom it is a point of great importance to know whether the custom has ever been confirmed when impugned; and therefore, this point should be determined first [in establishing such proof]. This principle is a valid one in the sense that such judicial decision is of considerable use in the proof of a custom; it is not so in the sense that such judicial decision is demanded to establish the truth and consummation of the custom.

The answer to the second statement.

I shall not avail myself of the other, negative reading of the text of the law: namely, that it is of much importance 'whether or not the custom was also confirmed in a contested trial'.[2] Thus stated, the matter is very clear: for a knowledge of such a rejection of a custom can be highly pertinent in a question of its establishment, since through a decision given against the custom, there is an interruption, or a cessation of the presumption of a tacit consent of the commonwealth, or of

[1] [A further challenge, that is, in the sense of an appeal as indicated in the third paragraph of Section 1 of this Chapter; *supra*, p. 534, cf. also note 1 on that page.—Tr.]

[2] [Suárez is here apparently giving a negative paraphrase of the text of the *Digest*.—Tr.]

the prince. The former reading of the law is, however, held to be the genuine one. The Gloss and the Doctors have explained it in various ways, as can be seen by reference to them.

7. We now pass to the third statement namely, that drawn from the law of Spain. As to the meaning of that law, our commentators have some difficulty, and certain of them attempt to interpret it as relating to a prescription. They do so, however, without justification: both because the law very clearly has reference to custom, as will be evident to any one who examines it; and because the interpretation they give the law does not hold even for prescription, or, at least, it involves them in the same difficulty with respect to it.

The answer to the third statement.

Others, however, admit that by the special law of Spain,[1] two judicial decisions rendered in favour of impugned custom are necessary in order that a custom be confirmed. This is the view of Burgos de Paz (Law 1, *Tauri.*, no. 247). But even though the words of the law, literally taken, favour this opinion, the meaning is so absurd that it does not seem admissible, because, as I have said before, this condition involves a contradiction. The reason is that if this requirement of two decisions were to hold, the first decision could never be justly given in favour of the custom, or in accord with its terms.

Burgos de Paz.

We must, then, it seems to me, take two parts of that law separately: the first is, that the custom to which it refers must be one that has been completely established and is having its effect as law; the second is, that such a custom shall be irrevocable by virtue of the rule embodied in that law. For the first of these, therefore, a repeated judicial decision is not necessary—and this is the matter of present concern to us. For the second, such a judicial decision would seem to be necessary—and in this respect, this law would seem to be one peculiar to Spain. Therefore, the question of its present existence as a matter of usage, or that of its interpretation, does not now concern us. And this sense is easily inferred from the words of the law itself: 'If the people shall have observed a custom for ten or twenty years with the knowledge of the sovereign and without his forbidding it, then they are free to follow that custom in the future.' This is the first part of the law; in it nothing more is required for a legal custom. Then, however, follow the words: 'Such a custom is to be observed in the future, if within this same time, a judicial decision shall have been twice given in favour of the aforesaid custom.' This is the second portion of the law, and in it the custom is no longer called one that the people 'are free to follow', but one that is strictly 'to be observed'—and it is for this effect of irrevocable obligation that that condition [of two decisions in favour of the custom] was specifically set down as

Two parts of the law distinguished.

[1] [*Las Siete Partidas*, Pt. I, tit. ii, law 5, previously referred to, *supra*, p. 534.—Tr.]

requisite. This interpretation of that law will become clearer from what we shall have to say in what remains of our present discussion and from that to be taken up in Chapter xvi.

8. Our reply to the fourth statement,[1] drawn from reason, is that, at most, it demonstrates that a decision given in favour of an impugned custom is of value in proof of the custom, and for the publication thereof—and this we readily concede. Nevertheless, before that decision was given, the custom was a true one; and, indeed, while the custom is still in the process of development, such a decision cannot be given in virtue of the custom, as I have already demonstrated. Again, before a judicial decision can be given, the custom must be sufficiently proved; therefore, before such a decision can be given, there can be a moral certitude as to the character and sufficiency of the custom which has been established; indeed, for those who cannot of themselves pass an opinion upon the character and sufficiency of the custom, a probable opinion of the Doctors is adequate proof.

The answer to the fourth statement.

Bartolus, in fact holds (on *Digest*, I. iii. 32, qu. 4), that the opinion of even one learned Doctor is sufficient, and on this point he is followed by many weighty authorities, whose opinions have been very carefully compiled by Mascardi (*De Probationibus*, Concl. 426), and by Sánchez (*De Sancto Matrimonii Sacramento*, Bk. VII, disp. xvii, no. 8).

Bartolus.

What is the value of the opinion of a learned Doctor.

Mascardi. Sánchez.

This view must be understood with the qualification that it holds only if this one Doctor's opinion is not contradicted by that of other authorities; and even in that case it is truer to say that it is necessary that several Doctors of high authority should be in agreement with his opinion concerning the custom, or that the statement of the one Doctor be supported by the weighty reasons of other authorities. This may have been the meaning intended by King Alphonso in (*Las Siete Partidas*, Pt. I, tit. ii, law 5), which states that two concordant decisions are sufficient to establish the certitude and proof of the custom in question in such
818 wise that no decision counter to them is possible, nor fuller proof of the custom demanded. The matter could be very properly settled in this manner, although the basis of the arrangement could not be the common law. For *Code*, I. iv. 3, to which the Glosses above mentioned refer, deals not with this point, but with the need of caution in granting pardon to an individual who commits an offence a second time. This relates solely to a matter of fact, and to the beginning of a custom not strictly so called, or a habit, as I have stated above.

9. Panormitanus, however, basing his opinion upon the teaching of the Doctors of both the canon and civil law, adds that although a decision of a judge is not necessary for a custom, it can nevertheless

Panorm.tanus.

[1] [*Supra*, p. 534.—Tr.]

be of assistance not only in proving, but also in establishing it. His reason is that if a judge decides against a law, with the knowledge of the people and without their opposing it, the consent of the people with respect to the custom to be introduced is made known. But surely if the judicial decision was just, it had to assume the custom to be a perfect one, and one in derogation of the law: hence, such a decision cannot serve to establish the custom; it can only indicate and strengthen it. If, however, the decision was unjust, it offers no good ground for presuming the consent of the people to the custom, since the people cannot easily resist a judge, or contradict him. From such a decision, then, it is not the consent of the people to the custom, but only their tolerance of it that is to be inferred, since they cannot oppose the decision. Accordingly, Antoninus and Rochus set down a number of conditions that must be fulfilled for such a reason to have any value. I pass over a discussion of those conditions, since, notwithstanding such a judicial decision or judgment, the same number of actions are required for the custom, and the same period of time is necessary for its prescription. For an unjust decision cannot remit any of these requirements—nor is the contrary based on any known legal rule.

Antoninus. Rochus.

Sylvester.

10. Sylvester, on the other hand, asserts (word *consuetudo*, Qu. 4 [, no. 7]) that in the case of judicial acts a judicial decision can assist in the establishment of a custom: 'in such wise that from two decisions, with a proper lapse of time intervening, and with the consent of the people, given either from the beginning or after the event, a valid custom is to be presumed;' and this because these decisions have an aptitude for establishing a custom (*Digest*, V. ii. 5 and XXIX. v. 3, § 1).

This assertion calls, however, for further examination and clarification. For it is certain that just as through extrajudicial acts, in reference to the making of contracts and wills, and in other observances, consuetudinary law can be established respecting actions of a like kind; so, by judicial acts there can be introduced custom respecting similar acts. These latter customs are, as I said above, known as those of 'style'. This contention is clear both from what has been said above, and by parity of reasoning, or even, *a fortiori*. For this reason I add that just as for an extrajudicial custom no decision handed down by a court is required, so neither is one necessary for a judicial custom—for one, that is, arising from judicial acts. The reason is that there are many judicial acts which are distinct from judicial decisions, and such acts can be repeated over a period of time sufficient for the establishment of a custom; and this, without any judicial decision having been given for or against the custom. In such a case, therefore, the custom is established without a judicial decision having been passed upon it; for all the reasons which hold for an extrajudicial custom, hold equally for such acts and such custom.

Indeed, even though these judicial acts are declarations of law and even though they are judicial decisions repeated many times, there will never be necessary a judicial decision which (as it were) reciprocally decides on the custom of giving such decisions. And so, formally, and properly speaking, for the establishment of a judicial custom, there is never required, in addition to the acts themselves that expressly initiate a custom, any decision given in favour of such custom, when it is impugned, nor any decision that a legal rule has been established by that custom. And this is true also if the custom is concerned with this or that way of proceeding to judgment, or with the pronouncing of judgment after one or another style; the custom is introduced, essentially, by the repetition of the acts of judgment themselves. Thus there is no proper, formal distinction between judicial and extrajudicial actions [in respect of the conditions requisite for the establishment of custom].

The opinion of other writers.

11. Yet many writers assert that in the giving of decisions and even in judicial acts, two actions are sufficient for the establishment of a custom. This seems to be Sylvester's opinion in the passage quoted above (Section 10). It is that of the Gloss (on *Digest*, I. iii. 32, word *inveterata*), and of Giovanni d'Andrea (on *Decretals*, Bk. V, tit. XL, chap. XXV), and, that also of Bartolus (on *Digest*, I. iii. 32, in *Repetition*, Qu. 4). Many other writers in speaking of style indicate that two actions are sufficient for the establishment of a style; and a style is, as I have stated above, nothing more than a custom in matters of this special kind. This seems to be the opinion of Decio (on rubric to *Digest*, I. iv, no. 35), where he states that lapse of time is not required for style. Rebuffi (Tr. *De Consuetudine*, in *Repetition*, Art. 2, gloss 13, nos. 10 and 17) even says that usage, or a plurality of acts is not necessary for proof of style, and he cites other authorities in support of his opinion. Cristóbal de Paz (on rubric to law on style, Pt. I, nos. 76 *et seq.*) defends this latter opinion, and he cites Cynus (on *Code*, VIII. lii (liii). 2 [, no. 7]), who states that the authority of style is so great, that even if the style is brought in by a single judge, it will have the force of law, and by style he means one established by general conduct without the aid of written
819 law. Cristóbal de Paz sets forth the same opinion at length (*ibid.*, nos. 86 *et seq.*).

Sylvester. Gloss. Giovanni d'Andrea. Bartolus. Decio. Rebuffi. Cristobal de Paz.

Much of what Antonio de Butrio has to say on the observance [of style] in his comments (*De Consuetudine*, Chap. xi) would seem to confirm this opinion. Rochus, quoting him (*De Consuetudine*, Pref. no. 27) speaks to the same effect. They assert that a fixed period of time is not required [for the establishment of a style], but that two or three acts are sufficient to make the observance of it binding in judicial actions. And this, especially if such an observance is declarative and interpreta-

Antonio de Butrio. Rochus.

tive of law. Finally, many of the remarks made by Rochus (*De Consuetudine*, Qu. 5, no. 34) on use and custom are to the same effect, especially that in which he contends that two acts are sufficient for a custom, particularly in judicial matters.

12. Nevertheless, having reviewed the essential elements of the question and taken into account the points of difference in the matter involved in it, I find nothing peculiar in this respect in judicial acts, setting aside those in which the person and authority of the sovereign prince vested with legislative power are involved. For his power is a special one in respect to certain matters, as I shall immediately explain. Therefore, although it is certain that law can be established by means of unwritten style, as all jurists teach in their commentaries (on *Decretals*, Bk. I, tit. II, chap. xi and on *Code*, VIII. lii. 2) and as, in particular, Baldus asserts (on *Code*, IX. xlix. 7), as well as Jason (on *Digest*, XXX. lxxi, § 2, no. 5); nevertheless, I do not find that it is defined in any law that two acts or any fixed number of them are sufficient for establishing a legal style, nor that such is proved by any plausible reason; nor that any distinction has been established in this respect between style and customs made up of other kinds of acts.

What must be said of judicial acts.

Baldus.

Jason.

I assert, therefore, that in judicial acts, just as in others, there are required such a frequency of the act and such a lapse of time as is sufficient either for validating the custom by prescription, or for manifesting sufficiently the common consent of the prince and of the people.

What duration of time is required in judicial act.

13. And, first of all, this is the meaning of the laws, which require absolutely for style or its acts frequent use and custom. This is evident from the *Code* (VIII. lii. 1), which uses the words: 'when those acts have been proved, which have been frequently used in the city in the same kind of controversy'. The same is also evident from the *Digest* (V. ii. 5)—cited by Sylvester [word *consuetudo*, Qu. 4] which says: 'when [certain practices] are constantly in use'; for the word 'constantly' signifies more than two actions. The other law, however (*Digest*, XXIX. v. 3, § 1), cited by Sylvester, is in no way applicable to the present situation. In the same way, the other laws which require a frequency of acts do so in general terms and without determination as to number.

Sylvester.

Bartolus.

Moreover, this is clearly the meaning of Bartolus (on *Digest*, I. iii. 32, no. 14); for, even in the case of judicial decisions, he requires for the establishment of custom a period of ten years and the tacit consent of the people. Decio (on rubric to *Digest*, I. iv, no. 35), states the same doctrine more clearly. He says that for the establishment of a style of the legislator no lapse of time is required; that in other cases, however, a lapse of time is necessary for the introduction of the style. He then proceeds to the conclusion that the frequency of actions necessary be determined by a prudent judgment, in the manner explained earlier in this Book. Saliceto (on *Code*, VIII. lii. 2, no. 23) holds the same view. He says that the repeated acts of a single judge do not establish a style, unless he is a magistrate clothed with sovereign authority. This opinion is defended by Baldus in his comment (on *Code*, VIII. lii. 3), and by Bartolus (on *Digest*, XXVII. i. 30, near the end). Many arguments in favour of this view are to be found in Burgos de Paz (in Pref. to the laws: *Tauri.*, nos. 220 *et seq.*), and in Cristóbal de Paz (on Rubric to law on style, Pt. I, nos. 86 *et seq.*).

Saliceto.

Baldus.

Bartolus.

Burgos de Paz.

The reason on which these laws and legal opinions are based has already been touched upon: it is that neither a judge nor his subordinates possess the power to make law, even if they should expressly wish to do so; they cannot, therefore, by two or three acts tacitly establish law: such authority has not been granted them either by reason or by the law.

14. It may be objected that even though this may be true of certain judicial acts which are preparatory (so to speak) to the decision itself, it is not true of that decision, for the latter has a special character in that by it law is stated and made clear: it would, therefore, seem to have the power of making law, since it is passed by public authority. This would seem to be especially true where the judicial decision has been twice handed down and accepted by popular consent, for it then seems to be law approved by common consent.

An objection.

I reply that if the judge giving the decision is not a sovereign prince, and so does not possess legislative authority, his decision, even if it is given more than once, or if it is repeated by different judges of the same rank, has not, on the mere ground of the number of acts performed, the effect of making law. This is the meaning of the *Digest* (I. iii. 38), where it says: 'or of cases always decided in the same way'. The reason is that those decisions are not sufficient to establish law either after the manner of a custom, for reasons already given; or after the manner of a written law, since a judge possesses no power to make law. In this respect, such a decision is different from one which is given by a sovereign prince: for that of the prince has the force of establishing law, not through the medium of custom, but by means of written law, in the manner described in Books Three[1] and Four[2] of this treatise. In the case, then, of a decision handed down by the prince, two acts are not required: one only is sufficient.

Solution.

In the case of an inferior judge, however, not even many repeated
820 acts suffice, according to an express provision of the emperor given in

[1] [Only Chapters i–iv and xxxii–xxxiii of this Book are included in these *Selections*. *Vide supra*, pp. 361–413.—Tr.]

[2] [Not included in these *Selections*.—Tr.]

Gloss. the *Code* (VII. xlv. 13). On the ground of that law, the Gloss (*De Consuetudine*, Chap. xi, word *legitime*) says that two occasions do not suffice 'since,' in the words of the law, 'judgment must be given not by precedents, but by laws'. Hence, the decision of a private judge has some weight of authority; and if he is a senator of the commonwealth or of the kingdom, the authority of his decision will be much greater; and it will be further enhanced by the handing down of decisions in agreement with his own: but even so, these decisions will have the authority not of law, but rather of an opinion of a Doctor of high authority, or even of many Doctors, as is evident from the decisions of the Rota[1] and the like. And if in a kingdom it is especially provided by statute, that judges shall not dissent from a decision which has been handed down twice or oftener by the royal senate, that rule will be one peculiar to the realm in question; and that, not by virtue of a custom, but by that of written law. Such law apart, however, the tacit consent of the people, or of the prince, is not to be presumed, unless a sufficient lapse of time, and a sufficient frequency of actions make such consent clear.

15. In reply to the objections contrary to our thesis in respect of style, I reply that any assertion touching that kind of custom must take into account the two kinds of style: that which has the force of law, and that which is merely factual. As to the first, I assert that it does not exist until the style has either been approved by written law or established by a completed prescriptive custom; or, at least, when it is a style so clearly of the sovereign prince who has authority to make law, that he sufficiently declares through it his will that it be law. Again, the term 'style' may be used of custom based on the authority not of the sovereign prince, nor of the law, nor established through a sufficient custom; that is, it may be used of style that has become usual through a few actions—and such a style, I say, is to be followed and observed, not because it is legally binding but because it displays a prudent and fitting mode of action. It is to be observed unless the most urgent reasons are brought against it, or some grave necessity compels a contrary procedure. This, it seems to me, is the purport of the remarks of Rochus and Antonio de Butrio on observances and style of fact, as well as the remarks of many other writers referred to in Section 11 of this Chapter.

Two kinds of style taken into account.

Rochus. Antonio de Butrio.

[1] [The Rota, called the Sacred Roman Rota, is a Roman ecclesiastical tribunal established early in the fourteenth century to hear cases of appeal to the Holy See. Under present discipline it decides in the second instance, on appeal, cases tried by Ordinaries. Matrimonial cases now form a large part of its business.—Reviser.]

CHAPTER XII

WHETHER ONLY VOLUNTARY ACTS AVAIL FOR THE INTRODUCTION OF CUSTOM

1. That the actions by which a custom is established must be voluntary is the certain and generally accepted doctrine on this point.

This assertion is proved as follows: the actions constituting a custom are of effect in the establishment of the custom only in so far as the consent of the people is manifested through them. But they cannot manifest that consent unless the acts are voluntary. The acts, therefore, by which a custom is established must be voluntary.

The acts establishing a custom must be voluntary.

The inference is evident. The minor premiss is an unquestioned principle of moral philosophy. The major premiss is likewise generally agreed to by all the Doctors who deal with this subject. For this reason, as we also saw in the first Chapter of this Book, many writers desire that this consent be expressly included in the definition of custom; that it must be included, at least implicitly, all agree. The reason is that, even though the consent of the prince is also necessary, as we shall state presently, nevertheless, his consent assumes the consent of the people, with which, in this usage, he complies. This is manifest when the custom derogates from the law of the prince; yet the same is true when the custom establishes law, since this legal custom originates (so to speak) with the people, and thus assumes their consent. Whence, even though the expression of the people's consent is necessary in some way for the validity of all law, the mode of its expression need not be the same with respect to this unwritten law [of custom] as with respect to written law. For, primarily and directly, the law emanates from the prince, and he requires consent from the people in obliging them to accept the law, as I have stated in Books Three[1] and Four.[2] But legal custom originates with the people by their willing that the law be introduced, in so far as they have the power to do so, and by their tacitly requesting consent thereto from the prince. It is for this reason that their customary acts must be voluntary.

2. From this principle I infer that a custom cannot be established by means of acts done in ignorance, or in error, since these are involuntary. This is the doctrine set forth in the Gloss (on *De Consuetudine*, Chap. xi), and that of the Cardinal[3] on the same passage. It will be found also in the Gloss (on the *Decretum*, Pt. I, tit. viii,

A custom cannot be established by means of acts done in ignorance or in error.

Gloss. The Cardinal. Gloss.

[1] [Only Chapters i–iv and xxxii–xxxiii of this Book are included in these *Selections*. *Vide supra*, pp. 361–413.—Tr.]
[2] [Not included in these *Selections*.—Tr.]
[3] [i.e. Gratian.—Reviser.]

Innocent. Bartolus. Baldus.

chap. vii), in Innocent (on Rubric to *Decretals*, Bk. I, tit. iv, no. 4); in the Gloss and Bartolus (on *Code*, VIII. lii. 2, qu. 17, at the end); also in Baldus (on *Digest*, I. iii. 32, in the fifth objection).

The others, to whom I shall refer, assert almost the same thing except that they add a qualification and a proof from the *Digest* (I. iii. 39), of which we shall speak presently. The stronger proof is that drawn from the *Digest* (*ibid.*, 32), inasmuch as it places the whole force of custom in the consent of the people, which is, obviously, nullified by error. This position is also supported by the *Digest* (*ibid.*, 35) which states that a custom has the force of law from the tacit agreement of the citizens; now a true agreement is lacking where an error intervenes. The law farther on in the same title of the *Digest* (*ibid.*, 36) says that consuetudinary law is of great authority, 'for the reason that it has been proved so clearly that it had no need of being reduced to writing'. But a custom introduced through error cannot 821
have such authority; nor can it be held to have been truly proved, but merely thought to be so. So also in the *Code* (VIII. lii (liii). 2 [1]), it is said: 'An anterior custom, and a reason [for acting] which has resulted in a custom must be preserved.' This law, then, assumes that a custom should emanate from reason, and not from error. For if it has been established through error, upon discovery of the error, there disappears the apparent reason which might justify such a custom; and consequently the custom itself lapses also, because it cannot persist without a reason. Wherefore, even though the custom will seem to prevail and to establish law before the error is detected, it will do so only from an erroneous persuasion; for when the truth is known, the force of the custom vanishes. It was never, therefore, true law, but was merely thought to be such; and the same is true of the custom itself.

3. The objection is brought against this reasoning, that the pas-

Objection.

sage from the *Digest* (I. iii. 39), says: 'What has been first introduced not by reason, but through error, and was then held to be binding through custom, does not hold in similar cases.' The apparent inference from this text is that a custom established and confirmed by error is valid as to that subject-matter in respect of which it was initiated, but that it must not be extended to similar cases. This is the opinion of Bartolus (on *Digest*, I. iii. 32, no. 5, and *ibid.*, 33, and on *Code*, VIII. lii. 1 [, no. 21], with the Gloss thereon) as well as that of Baldus, and other authorities. Panormitanus holds the same view (*De Consuetudine*, Chap. xi, no. 12), as does Antonio de Butrio on the same Chapter. Rochus is in agreement with these writers (*De Consuetudine*, Sect. 4, at the beginning), and cites others whose opinion may be summarized in three points.

Bartolus. Gloss. Panormitanus. Antonio de Butrio. Rochus.

First, they assume that a custom founded upon certain knowledge and without error, and with other adequate conditions, is not only

valid in the subject-matter with which it is concerned, but may also be extended to similar matters. They add, secondly, that a custom established through error is also valid in its own subject-matter. Thirdly, they conclude that the latter custom differs from the first, [only] because it cannot be so widely extended to similar cases.

While the first of these points seems to have been most favourably received by the jurists, I find great difficulty in accepting it. But, since it cannot be properly analysed or explained in general terms, we shall deal with it when we come to the chief particular effects of custom.

Explanation of the law which has been brought forward as a proof.

The second statement, however, is directly opposed to our assertion, and these writers prove it not by any argument but by a reference to *Digest*, I. iii. 39, nor do they answer the argument advanced in support of our thesis—that error annuls consent—whereas they themselves use the same argument to prove their third point.

4. Accordingly, I do not think that this [second] opinion is valid with respect to true custom, with which alone we are at present dealing. This I shall prove in detail, assuming certain points which have been conceded by the Doctors above cited. In the first place, Cynus and other ancient authorities, with whom Bartolus also agrees, qualify that assertion for the reason we have given. They hold that that assertion does not apply to a custom which is opposed to law. Their reason is that if the people act contrary to law from ignorance, or if they err in their judgment of its terms, it is clear that they have no intention of derogating from the law.

The foregoing interpretation of the above-cited law is attacked.

Cynus. Bartolus.

In what manner, then, is *Digest*, I. iii. 39 to be explained in its relation to a custom of this [erroneous] sort? For is not such a custom a very clear example of custom introduced without reason and through error? Indeed, many writers in touching on custom of this kind hold that the law of the *Digest* is to be read as referring especially to custom established in opposition to a positive law, inasmuch as it refers to custom 'not initiated by reason', in order that it may not seem to be referring to unreasonable custom.

Moreover, concerning even a custom that is outside the law, Bartolus and others distinguish between error of fact and error of law. Respecting a custom established by an error of fact, they admit that it is invalid owing to a defect in consent, according to *Digest*, II. i. 15. If the error be merely one in respect of the law, they say that the custom is nevertheless valid, with the aforesaid limitation, however, that it is not to be extended to similar cases.

Bartolus.

5. Therefore, we admit that the first member of this latter assertion

thus distinguished is not contrary to our contention, and we attack the second member of that assertion; for an error concerning the introduction of law removes the element of consent in introducing it. For in those customs which are outside the law there can be no error as to law, save by the misapprehension that their subject-matter is either forbidden or enjoined. For under the misapprehension that the matter is prohibited, the custom is not one intended for establishing new law, but rather one in derogation of [misapprehended] existing law. But no custom can derogate from law where there is no law in existence from which departure is made. Again, an erroneous custom of the second sort [, based on the misapprehension that the matter is enjoined by law,] cannot establish law, since it was formed not with that intention, but rather with that of obeying the law [, misapprehended as existing]. For, just as a custom that has sprung from true law does not establish any legal rule, as we said above, neither is it possible for a custom which has grown out of a falsely presumed legal obligation to establish any 822
legal rule, for the popular consent is annulled by the false presumption —as will be more clearly evident from what we shall say in the following Chapters. Therefore, a custom derived from error never has the effect of establishing law, even in its own subject-matter. Whence it is clearly the more logical and better grounded conclusion that it is not to be extended to other cases.

Rochus. Baldus. Accordingly, I do not approve of the example which Rochus borrows from Baldus, to the effect that if a people are accustomed not to reap a crop of grain from a certain locality, because they believe that this is forbidden, this custom establishes law, for the reason that even though the people are in error as to the law in the matter, they do consent to the fact. But I hold that such material consent to fact

Rochus. is not sufficient: rather, to establish law, they must consent to the fact as establishing a legal rule. The reason is (as Rochus himself admits in the Chapter to which I have referred and as will be said in that which here follows) that law is not established by a custom apart from a purpose to establish a custom, that is, a legal custom. Now error takes away such purpose, as we have clearly demonstrated. Therefore, . . .

An excellent example is that of religious profession tacitly made which is not established as valid by any usage, so long as error concerning the validity of the previous profession persists, owing to want of consent. This is a well-known example.[1]

6. But in regard to the argument drawn from *Digest*, I. iii. 39, my first reply is that this law can be explained as having applica-

[1] [Suárez here refers to the case of a Religious who takes vows invalidly, in consequence of some unknown defect. In order to validate the vows, such a Religious must give explicit consent, and take the vows again, conscious of their previous invalidity. No amount of religious observance, as though the vows had been valid, is of any avail.—Reviser.]

tion to a legal prescription, but not to a true legal custom. For in the case of prescription, it can happen that a custom may originate without a reason, that is, without a true title, and in error, when the custom begins in good faith and so continues and persists up to the point of the establishment of a valid prescription. But this can scarcely be understood of a true and legal custom; and this, both for the reasons we have already set forth as to the force of error in annulling consent; and because consuetudinary law cannot be established without a ground in reason. However, that last clause of the above-cited law, ['it] does not hold in similar cases, might not seem applicable to prescription, since there is never question of extending the identical prescription to subject-matter other than its own, merely because of a similarity existing in such subject-matter. Whereas, if the manner of establishing prescription is identical, in another similar situation, the same prescriptive right will arise.

Answer to the objection drawn from *Digest*, I. iii. 39.

Nevertheless, I think *Digest*, I. iii. 39 is correctly interpreted in regard to this point by the legal rule that 'what is a matter of special concession to any one, ought not to be used as a precedent by others' (in *Sext*, Bk. V, *De regulis iuris*, rule 74). This opinion is confirmed by another rule (*ibid.*, rule 78), which states that, 'what has at times been granted, on account of necessity, cannot be employed as an argument' [in other cases]. It is also stated in the *Digest* (I. iv. 1), that grants to particular individuals are not to be set up as a precedent. Thus, what *Digest*, I. iii. 39 may have been framed to say was, that what is permitted to one person on the ground of a consuetudinary prescription made in good faith, but lacking in reason and founded in error, cannot be taken advantage of by others, even if in other respects their cases are identical or similar. This is the interpretation of the law that I draw from the Gloss on *Digest*, I. iii. Gloss.
14, which is similar to the passage in the *Digest* which we are discussing. The one law assists us to the correct reading of the other.

7. A difficulty against this reading of the law may be drawn from the fact that the law of which we are speaking [law 39] is found under the title *De Legibus* [*Digest*, I. iii], whereas the laws that precede and follow it deal with legal custom.

Objection.

But it is not to be wondered at, if, to avoid another absurd reading of law 39, we extend somewhat the meaning of the word 'custom' in that context. And we do so especially, since many points in those laws apply equally to both sorts of custom,[1] and the Doctors, in expounding these common points and setting forth the conditions of custom, succeed only in confusing everything, as I have frequently remarked. The common example, which the jurists use as an

Solution.

[1] [i.e. legal custom and prescriptive custom.—Tr.]

Gloss.

illustration of an established custom, that if the owner [that is, the buyer] of wine has placed his hand upon the cart,[1] from that moment the wine will be at his own risk, certainly refers to a custom of prescription. The explanation of the Gloss on the aforesaid law[2] is that such a custom is not transferred to any like cases, that is to say, as a prescription against persons against whom no prescriptive right was set up in virtue of such a custom as we have mentioned. The whole of this matter may be considered as relating to the title *De Legibus*; for although this custom does not make law, it does change the subject-matter of the law, in such wise that by reason of the custom the laws must be applied in a different way in a case of this kind.

8. Secondly, if we wish to read the aforesaid law 39 [*Digest*, I. iii. 39] as applying to true legal custom, we shall reply that it does not say it is possible that a custom may be introduced without reason, and by error; but rather that it sets forth the contrary. This is the meaning of the Glosses cited in our assertion, and in our reasoning, which refer to this law in support of the interpretation they set forth.

Another interpretation of the law, i.e. *Digest* I. iii. 39.

Hence, the sense of the words, 'it [, i.e. the custom,] does not obtain in other cases, of a like sort' is not that the custom does obtain in that particular matter, but that it does not in similar matters. For probably this same statement could be made of every custom, even of one established with certain knowledge, as I state later on. Certainly, if other customs extend [, as our opponents hold,] to similar cases, a custom [founded upon error and lacking reason] would also extend to like cases if it were true law [; but this our opponents deny]. The ground of this conclusion is that such extension can never be made except in so far as the reason of the law permits, a principle that is verified in 823 every true law. Therefore, that interpretation of the law is at variance with sound reason. Therefore, the meaning of the words, 'that it does not obtain in other cases, of a like sort' will be that such a custom does not persist, and that when the error is recognized, there exists no right to perform actions similar to those which were previously done in error, that is, in observance of a custom which was thought to be, but was not, legitimate. This interpretation is neither absurd, nor does it do violence to the words [of the law], and thus read, the aforesaid law 39 proves our assertion, as the Glosses imply.

9. Finally, the inquiry can be made on this point, namely: what

[1] [Presumably a cart belonging to another person who has agreed with the buyer of the wine to transport it to the buyer's house. Though the translation is exact, is it not rather a case of the buyer of the wine accepting responsibility of transport, and thus freeing the seller of the wine from all liability? At owner's risk, as we say. The argument of Suárez is somewhat difficult to follow here. –Reviser.]

[2] [The Gloss says: 'If the owner of wine put his hand to the cart even to help, the wine is then at his own risk.' This is contrary to reason, and is a custom introduced by error: it is therefore not a valid custom in the case of other liquids, even though this custom was afterwards approved with certain knowledge and with tacit consent. –Reviser.]

sort of ignorance or error is to be understood here [in the assertion that custom is not established by acts arising from ignorance or error]?

The kind of ignorance or error that does not establish custom.

For on this point also, Cynus and the other jurists distinguish, as usual, between the motive [, i.e. cause,] and the final cause,[1] and they say that the assertion [which we are here defending] must be understood of an error as to the final cause [of the custom], not as to its moving cause. But I have had much to say of this and similar distinctions in my other works (*De Iuramento*, Bk. II, chap. xi, and *De Voto*, Bk. I, chap. xi),[2] and what I have there said is applicable in due proportion to the present question.

I shall, therefore, here content myself with saying that the assertion of this Chapter must be understood as pertaining to an ignorance concerning those things which relate to the substance of the custom, whether in respect of the law or of the fact on which the law is founded. Ignorance of this kind precludes the necessary consent, as has been previously stated. If, however, the ignorance is one that concerns other motives which are accidental, no hindrance is created, since such ignorance does not destroy consent. Some writers, however, interpret the aforesaid law 39 [*Digest*, I. iii. 39], as applying to this sort of error regarding incidental matters. They assume that the law states that a custom in accordance with law is established despite the existence of errors of this sort. But these writers have not been able to explain satisfactorily why they should have to say that such a custom does not hold in similar cases, since an error that does not touch essential matters cannot present an obstacle to such extension, if a true custom [, as they teach,] is permitted such extension. In the light of this interpretation, their teaching is not conclusive.

The assertion must be understood of an ignorance which relates to the substance of a custom.

10. In the second place, it is to be inferred from this assertion that a custom does not prevail, nor is it established validly by acts done under compulsion or from grave or unjust fear. This is substantially the doctrine of Bartolus (on *Code*, VIII. lii (liii). 2, qu. 18 in its entirety, and in no. 19, in reply to the last objection but one [and *ibid.*,

A custom is not established by means of acts done by compulsion or from grave fear.

[1] [Aristotle recognizes four causes of being (*Physics*, II. iii; Loeb ed., Vol. I, 129): (*a*) material; (*b*) formal; (*c*) moving, or efficient, and (*d*) final. In the scholastic philosophy, following Aristotle, the (*b*) formal; (*c*) moving, or efficient, and (*d*) final. In the scholastic philosophy, following Aristotle, the immediate moving cause is called the efficient cause (*causa efficiens*); and the ultimate purpose of the action, the final cause (*causa finalis*). The efficient cause is that which, by its action, produces an effect substantially distinct from itself. In other words, it is the cause '*causa virtute effluxus immediate producitur*'. Efficient causes acting towards ends are distinguished as (*a*) acting by intelligence; or (*b*) acting by intention of a rational creature is not involved; thus, excessive heat coming in contact with a piece of paper *of its own nature* reduces that paper to ashes.—Tr.]

[2] [Not included in these *Selections*.—Tr.]

no. 23]), and of Antonio de Butrio (*De Consuetudine*, Chap. xi). But Rochus Curtius (*De Consuetudine*, Sect. 5, no. 3) seems to hold the contrary opinion, for he says that a custom is established by acts done from fear. However, he refers to the above-cited authors, and evidently intends his own assertion to be understood in the light of the assertions of these writers. Hence, Rochus does not differ from us; but by acts done from fear he means either that the fear is of slight and trifling importance, or, at least, that the acts, though inspired by fear at the time of their performance, are later freely confirmed and accepted in the course of time. For that is Bartolus's doctrine also. The ground on which our present inference is drawn is that force and fear preclude the consent required for the introduction of custom. This, however, applies to compulsion strictly so called.

11. A difficulty may be raised as to the validity of customary acts done out of fear, because, although fear may make an act involuntary under one aspect, still of itself it leaves the act an entirely voluntary one.[1] Whence arose the occasion for the dispute as to whether from the nature of the case fear alone is sufficient to invalidate a forced consent, in such wise that the consent shall not have the effect of establishing consuetudinary law, and as to what kind of fear can have this effect. But since the question is general and one that arises in connexion with other matters, and since I have discussed it at length in *De Iuramento* (Bk. II, chap. ix) and in *De Voto* (Bk. I, chap. vii),[2] I now refrain from discussing it.

In what way fear may cause an involuntary action.

I shall say no more than that there is a much stronger reason why, in the case of custom, fear should be a bar to validity: and it is that, for a custom, mere actions are not sufficient; it is essential that those actions be performed with the intention of introducing custom, and this intention is commonly tacit rather than expressed. But when the actions are done solely from fear—when they would not be done except under its compulsion—they lack that intention; nor can such an intention be morally presumed, since the fear in itself, in a certain way, excludes it. Thus, a frequency of actions done solely from fear, is never sufficient evidence of the public consent of a whole people to the establishment of a custom. There is the additional consideration that the prince cannot be presumed in such a

In connexion with the present subject-matter, there is greater reason why fear precludes the establishment of custom.

[1] [The concept of a *voluntarium* and of the species into which it is divided is of the first importance in ethics and Catholic moral theology, &c. A *voluntarium* is an act that proceeds from the will with a clear [i.e. 'intellectual'] knowledge of the purpose [i.e. nature] of the act. The act of jettison [, of throwing the cargo out of the ship in order to escape shipwreck by lightening it,] is, under the circumstances, an absolutely voluntary act: but there is, in the will, as an active faculty, a *certain reluctance* in throwing cargo away, and consequently, the act, though absolutely voluntary in the will, is done with regret, and under that aspect, it is called and is an involuntary act *secundum quid*, i.e., the act would not be done under other more favourable circumstances.—REVISER.]

[2] [Not included in these *Selections*.—TR.]

situation to give his consent, since he does not wish his subjects to be forced to adopt customs of that kind under unjust fear. And if he himself brings force and fear to bear [upon his people], he commits an injustice, because he would *morally* oblige the people to adopt the custom, as I have said in connexion with the passage cited above, in similar cases.

CHAPTER XIII

WHETHER THE CONSENT OF THE PRINCE IS NECESSARY FOR THE INTRODUCTION OF A CUSTOM, AND WHAT MUST BE THE NATURE OF THIS CONSENT

1. We must devote this Chapter to inquiries respecting the principal efficient cause of consuetudinary law. In this, the consent of the
824 prince must first of all be recognized as necessary for the introduction of a custom. This assertion I have derived from the common teaching of the Doctors. The opinion of the few who teach otherwise, I shall discuss at a later time, to better advantage.

We must, then, in order to distinguish what is certain from what is uncertain, mark the distinctions that exist between peoples [in respect to their power to make laws]. For, in the first place, a custom can be that of a people which is in possession of supreme legislative authority, a status enjoyed only in the domain of the civil law, and by those commonwealths which acknowledge no superior in temporal affairs.

In respect of communities of this sort, our assertion does not seem to be pertinent, but it is true in so far as it has reference to them. For in a state of this kind, the sovereign is the whole commonwealth, and so, if a custom is accepted by such a people, the consent is necessarily given by the sovereign, since in this case the two are identical. *Digest*, I. iii. 32 refers clearly to a community so organized.

Various classes of communities distinguished.

But if the sovereign power has been transferred to a senate, and some disagreement arises in that body, then it is necessary that a majority of its members hold to the custom, for otherwise the custom cannot be said to be observed by the larger portion of the community in respect of its power to establish law. And the senate could not be regarded as tacitly giving its consent, if the major part thereof does not hold to the custom. Accordingly, our assertion is found to be true with regard to peoples possessing such legislative authority, and of them nothing further need be said.

A first class of community.[1]

2. We may, next, have a people which recognizes a superior, but holds from him the authority to make laws or municipal statutes, even as, according to *Digest*, I. i. 9, the

A second class of community.

[1] [Suárez really discusses four classes of communities in this passage, though his marginal notes indicate only three.—TR.]

cities especially have by commonly accepted law. It is certain that just as such a community is empowered to enact written law, so it can introduce law by custom (*Digest*, I. iii. 32 *et seq.*). Whence, just as they can enact law without the renewed consent of the prince, so they can establish customs. Nevertheless, the consent of the prince is not entirely lacking in such a case, since he has given it through his permission to make laws, and wishes it to be continuously available. Thus, under such an arrangement, the prince need not have particular knowledge of a custom newly introduced into this or that city; for even without this special knowledge, he could give an antecedent consent (so to speak) and has done so when he granted to the people permission to enact in one form or another a particular law for themselves, should they wish to do so.

Wherefore, if the permission were given under the limiting condition that the law must be later confirmed by the prince, it could not be strictly binding before such consent had been obtained, as seems to be the situation in Spain. Under such an arrangement, our assertion would not apply. For it would then be necessary that the custom be confirmed by the prince also, and hence a renewed consent would be required from him, since a renewed confirmation is not had without such consent. Such a community, then, is, to that extent, to be held as, in a certain sense, lacking in authority to make laws apart from the prince. Of this matter we shall speak presently: for we shall have to introduce this point again, in our discussion of the nature of that confirmation and the means of obtaining it.

A third class of community.

3. Furthermore, there are communities which possess no power of making statutes or enacting laws, even of a municipal character, but who must accept those given to them either by a sovereign prince, or by their overlords or pastors. This is the relation which the Universal Church bears to the supreme Pontiff, and the particular churches to their respective pastors. For the people have no power to make canon laws; nor have the clergy such power apart from their superiors or without their superiors' concurrence—the peculiar differences in the various laws and communities being always taken into account.

The first opinion.

Many secular communities stand in this same relation to their sovereigns, as is self-evident. Hence, some authorities have said that these communities cannot introduce a custom without the special tacit consent of the prince himself (which I term his personal will); so, for such a custom they demand both a knowledge and a toleration of the custom on the part of the prince.

Gloss. Panormitanus. Innocent.

This is the doctrine of the Gloss (on *De Consuetudine*, Chap. xi), and it is followed by many writers. It is stated by Panormitanus in his comments on this law, and it is expressly set down by Innocent (on

rubric *De Consuetudine*, no. 4 [*Ex parte*]). It is found, again, in the Gloss (on *Code*, VIII. lii. 2), which cites the authority of Giovanni d'Andrea and Azo. This is also the opinion of Gregory López ([on *Las Siete Partidas*,] Pt. I, tit. ii, law 3, gloss 7 [*glossa* f]) and would seem furthermore to be that of St. Thomas (I.–II, qu. 97, art. 3, ad 3). St. Thomas says that in those communities which have a superior, custom is so far able to introduce law 'as is tolerated by those whose office it is to give law to the people. From this toleration they may be considered as approving of the rule established by the custom.' With this doctrine, Soto agrees (*De Iustitia*, Bk. I, qu. vii, art. 2), as do Sylvester (word *consuetudo*, Qu. 3), Driedo (*De Libertate Christiana*, Chap. xii), and Angelus de Clavasio (word *consuetudo*, No. 9 at the beginning). But, in fact, many of these
825 authorities can without difficulty be understood in the sense which I shall explain.

Gloss. Giovanni d'Andrea. Azo. Gregory López. Soto. Sylvester. Driedo. Angelus de Clavasio. Sylvester.

4. A proof of this opinion can be developed, first, from the *Digest* (I. iii. 32), where the whole basis of custom is founded upon the consent of a people, which can give force and efficacy to its own laws. This, then, was the primary force of the custom among the people, when they still retained the sovereign power; therefore, after the people has handed over that power to the prince, the force of custom will mainly depend upon his consent. For this reason, it is necessary that he should have previous knowledge of a custom, since without that no consent is possible.

The second proof is taken from *Las Siete Partidas* (Pt. I, tit. ii, law 3), where, among the conditions for custom, it is laid down that it be introduced with the consent of the prince.

Thirdly, it is argued from reason that legislative authority is no less necessary for the establishment of unwritten law, than of written law, as is clear from our discussion upon laws in general. But legislative power does not exist in these peoples—this is the supposition of the argument—either because they never had this power, as is the case with the canon laws, or because they have transferred that authority to the prince, as is the case with the civil laws. Therefore, it is necessary that the one in whom the sovereign power resides should give force to custom by his will and consent.

Distinction between the power of making ecclesiastical laws and the power of making civil laws.

5. Some Doctors, however—but not many—seem to admit that this opinion is true of the canon laws, but deny that it is so of civil laws. They submit, as the ground of their distinction, the fact that the power of making the canon laws never resided in the people, but in the prelates; on the other hand the authority to enact the civil laws was originally vested in the people. This is the view of Antoninus ([*Summa Theologica*,] Pt. I, tit. xvi, § 2). Covarruvias follows St. Thomas

Antoninus. Covarruvias.

Driedo.

(I.–II, qu. 97, art. 3), and also, very clearly, Driedo (*De Libertate Christiana*, Bk. I [, chap. viii]).

But I cannot approve of this distinction, since I feel certain that it is not valid: for, although the civil power was originally in the community, after the community has transferred it to the prince, the former no longer has that power in itself. The people, therefore, are in this case not less dependent upon the prince than if the community had never possessed the power to make laws.

The distinction is attacked.

Those writers might here object that when the people transferred their power to the prince, they did not give it up entirely, but only for the express uses (so to speak) of government, and for framing written laws and oral precepts; they surrendered it, that is, in such a way as always to reserve to themselves the power of introducing customs. But this view cannot be well-founded, since it is not proved from any law, nor does it appear in a perfect monarchy, either by custom or through any other evidence. Still, in a given kingdom, the royal power may be limited in that or some like fashion, at least by tacit agreement; as, for example, where the monarchy is not absolute, but partly democratic—as we made clear above in our discussion of the acceptance of law.[1] Yet this is not the usual situation, and the exception rather strengthens the rule to the contrary. Again, this opinion does not seem probable, for the reason that a temporal sovereign can revoke the private customs prevailing among his people, and can, for a [good] reason, prohibit their introduction. On the same principle, the prince may ordain that a custom shall be invalid if it lacks his express consent; which is evidence that the entire legislative authority of every sort has been transferred to him.

6. The third and true opinion is that which first of all lays down the general principle that the consent of the prince is necessary for the validity of a custom. For this is the common teaching of the Doctors, as I have said, and is effectually demonstrated by the proof given in our discussion of the first opinion. [The third,] however, further specifies that this consent of the prince can be understood in two ways. One, I term personal, because it is given by the prince in person, either by expressly consenting, or by antecedently permitting the introduction of a custom, or by approving it subsequently or contemporaneously, and this either in express terms, or when being aware of the custom he does not check it. The second kind of consent we may term legal or juridical, because it is given not by the prince personally, but through the law itself. Thus, if the prince enacts a law to the effect that a custom which contains such and such conditions shall be valid, he

The consent of the prince is necessary for the validity of a custom.

[1] [*De Legibus*, Bk. I, chap. xi, no. 7, which is not included in these *Selections*.—Reviser.]

thereby gives his consent, which is applied in particular to like customs which are introduced in virtue of that law.

Hence, we assert that consent of the first sort is not always necessary, the latter being sufficient. For it is self-evident that the first sort of consent is sufficient. That such express consent is not necessary, and that consent of the second sort is sufficient, I shall prove as follows. The law is never silent, and the will of the prince, speaking through the law, is no less efficacious than his immediate wish and command. What occasions are proper for the one or the other mode of consent, I shall discuss in the following corollaries [to this general principle].

826 7. My first inference is that, when a law is established by prescriptive custom, the personal consent of the prince is not required; nor, therefore, is any special knowledge of the custom on his part called for: but the custom is efficaciously established, even though he may have no specific knowledge of it, or may not have manifested his will with respect to it, either tacitly or expressly.

First inference: that the personal consent of the prince is not required.

This is the common opinion of the jurists according to Panormitanus (*De Consuetudine*, Chap. xi, no. 13). The same is set forth in the Gloss (on *Decretum*, Pt. I, dist. iv, can. iii, § *leges*, after the canon, at end and also *ibid.*, dist. viii, can. vii, in the last words), if the latter Gloss is carefully weighed, and by Cardinal Alexander[1] thereon, at the end. The same position is held by Antoninus and Barbatia and others (*Repertorium, De Consuetudine*), to which Rochus Curtius (*De Consuetudine*, Sect. 4, no. 24) refers many times. This opinion is held also by Dominicus de Sancto Geminiano (*Summa*, Dist. xi, near end), Angelus de Clavasio (*Summa*, word *consuetudo*,[2] no. 9), and Sylvester ([word *consuetudo*,] Qu. 4). The last-named two writers assume that a prescriptive custom suffices, even though the Pope has no knowledge [of the custom]. Felinus (on *Decretals*, Bk. II, tit. xxvi, chap. xvi, no. 11) teaches the same, although he qualifies his assertion with respect to certain special cases which touch upon other matters. Among the theologians who defend this opinion are: de la Palu ([*On the Sentences*,] Bk. IV, dist. xlii, qu. 3, art. 1, no. 7 [, concl. 3]), *Supplement*, Qu. 2, art. 2, concl. 3,[3] Antoninus ([*Summa Theologica*,] Pt. I, tit. xvi, § 2), and Sánchez (*De Sancto Matrimonii Sacramento*, Bk. VII, disp. iv, nos. 11 and 14, and disp. lxxxii, no. 20), who cites a number of other writers.

Panormitanus. Gloss. Cardinal Alexander. Antoninus. Barbatia. Rochus Curtius. Dominicus de Sancto Geminiano. Angelus de Clavasio. Sylvester. Felinus. de la Palu. *Supplement*. St. Antoninus. Sanchez.

8. The principal basis of this opinion is taken from the *Decretals* (Bk. I, tit. iv, chap. xi), where only two conditions are required for a custom, namely, that the custom be reasonable, and '[validated] by prescription'. To demand, then, another condition, namely, one not

[1] [i.e. Giovanni de Sangiorgio.—Tr.]

[2] [The Latin text incorrectly has *confessio*.—Tr.]

[3] [This reference to *Supplement* is apparently copied from Chap. xix, sect. 26, *infra*, p. 627, where *Supplement* of Gabriel Biel is cited as parallel to the passage from de la Palu; but the reference is wrong.—Reviser.]

included in these, is to demand a condition without a basis in law, in fact, one contrary to the law. But special knowledge [of the custom] on the part of the prince is such an added condition not included above. Therefore it is not necessary; and, therefore, neither is his personal consent necessary—since it is impossible without such knowledge.

This assertion is confirmed and explained as follows: the prince had the power to enact a general law approving a custom fulfilling such and such conditions laid down by him and giving validity to it without a renewed consent or knowledge of it on his part. But this he has done by means of that provision. Therefore, . . .

The major premiss is evident, for this course of action does not exceed the power of the prince, and this mode of manifesting his will is entirely sufficient, as I have shown; it is also the most convenient way, because it is practically impossible that all customs should come to the knowledge of the prince—as is noted (in *Sext*, Bk. I, tit. ii, chap. 1); and on other grounds it is expedient that reasonable customs should be observed and receive their [legal] force. Therefore, . . .

Finally, a confirmation of our assertion can be drawn from the similitude between this kind of custom, and prescription properly so called. It is because of this likeness that the custom of which we are speaking is called prescriptive: for in a prescription, knowledge on the part of the individual against whom the prescription is being established, is not necessary; so, also, a custom is said to be obtained against the prince by prescription, if it fulfils the terms of such prescription. Therefore, a custom of this sort, to be valid, does not call for a knowledge of it on the part of the prince.

9. An objection may be raised, namely, that the above holds true only of a custom abrogating law—which point is dealt with in the *Decretals* (Bk. I, tit. iv, chap. xi)—not, however, of a custom establishing law, because with respect to this custom there is no such rule. Again, it may be objected that the same holds true at most only for canon law, and canonical custom; for in the civil law no such rule can be found to have been laid down.

An objection.

My reply to the first part of this objection is that this rule in principle includes *a fortiori* custom constitutive of unwritten law, for the reason that the same power is necessary for abrogating a law of a prince, as is required to introduce a new law not contrary to the old. From another aspect, however, the need of the consent of the prince for permitting the revocation of the prince's own law would seem more necessary than that for the establishment of new law: since the revocation would seem to derogate more from his will and authority [, than would the introduction of new law]. This point is emphasized in the above-cited text [*Decretals*, *ibid.*]: 'Although the authority of an ancient custom is not slight, yet it is

The solution.

not to prevail so far as to prejudice even a positive law unless, &c.' Therefore, since this character is granted to a custom, if it has these two conditions aforesaid (Section 8, *supra*), every consuetudinary law that fulfils the said conditions is absolutely approved.

10. In reply to the second part of the objection, however, it is to be said first of all that, granting that the civil law has not declared this principle so expressly, nevertheless, it does not deny the validity of custom which fulfils those two conditions, whatever may be true of its effects, of which we shall speak in another place.

In fact, the civil law teaches virtually the same doctrine on this point, that the canon law sets forth in a clearer manner. For in the *Digest* (I. iii. 32) we find the words: 'It is most correctly admitted that laws are abrogated, not only by the decision of the lawgiver, but also through disuse, with the tacit consent of all.' In these words, a distinction is drawn between the people and the lawgiver, and the decision of the latter is not required. Further, in the following laws [*ibid.*, 33 and 35], nothing more is required—assuming that the custom is reasonable—in order that the custom may have legal force, than that it be
827 protracted, 'of long standing', or 'observed for many years'. In the *Digest* (*ibid.*, 38) it is added that the Emperor has ordained that an immemorial custom 'is to have' the force of law. In the civil law, then, according to its commentators, it is provided that a prescriptive custom is sufficiently complete, without any new knowledge of it on the part of the prince.

11. My second inference is that when a custom does not prevail in virtue of prescription, then the personal consent of the prince is requisite, that is, at least a tacit consent; and that, therefore, it is also necessary that he should have knowledge of the custom. This point we concede to the writers who defend the first opinion,[1] among whom is St. Thomas, whose language concerning the consent of the prince is general, and whose words can be interpreted as referring to either of the two ways by which the prince—as we have explained—may give his consent. This would seem also to be the opinion of Sylvester [word *consuetudo*, Qu. 4] and St. Antoninus [*Summa Theologica*, Pt. I, tit. xvi, § 2], who, while quoting and following the opinion and words of St. Thomas, nevertheless admit that sometimes a custom of which the prince is ignorant, does prevail. Finally, the authors cited for the opinion we have just discussed admit this.

If a custom does not prevail in virtue of a prescription, then a personal consent is necessary.

Sylvester.

St. Antoninus.

It is, further, proved by a sufficient exclusion of possibilities. The sovereign's consent is necessary; but in custom of this sort that consent is not given in virtue of any law, nor does any law definitely fix the terms under which it is given. Hence, his consent must be personal;

[1] [*Supra*, p. 554.—Tr.]

and for this, knowledge is necessary. This reasoning is also confirmed by the arguments brought forward for the first opinion.

12. On the question, however, whether such consent of the prince should be positive and explicit, or whether one which is inferred is sufficient—that is, it is sufficient that he knows and tolerates the custom or offers no opposition thereto—St. Antoninus indicates (*ibid.*), that an express consent is necessary, especially in the case of the supreme Pontiff. And this view might be urged in that toleration alone, even assuming that a knowledge of the custom exists, does not sufficiently indicate consent, because many things are allowed to be done which are not approved, according to the *Decretals* (Bk. III, tit. v, chap. xviii).

What sort of consent of the prince is necessary.

St. Antoninus.

Nevertheless, St. Thomas (I.–II, qu. 97, art. 3, ad 3), expressly teaches that a tacit consent is sufficient. This is accepted by other writers, and usage proves that tacit consent is regarded as of equal effect with explicit consent, as, with reference to this kind of custom, the aforesaid law 32 [*Digest*, I. iii. 32] states. It is necessary only that it be morally evident that the toleration is not merely permissive but an active or approving one; whether it is such will be easily seen from the circumstances and from usage, especially either when the approval is reasonable, or when, by a permission alone, the safety and well-being of the subjects is inadequately provided for, as I shall explain in the following Chapters. Nor in this matter is any exception to be made in the case of the supreme Pontiff. There is no law or reason for making such exception necessary. In some special cases, however, his explicit consent will perhaps be necessary, when the gravity of the matter or some particular law indicates that it is called for. But this can happen in the case of other princes also, and hence the rule we have given is, strictly speaking, a general one.

A tacit consent is sufficient.

13. To the basic principle of the contrary opinion, a ready reply is possible. For *Digest*, I. iii. 32 proves merely that there is required [, for custom,] the consent of him who is in possession of the supreme legislative authority, but it establishes no proof in favour of this or that mode of consent; nor does it obviate the possibility of this consent being given by law; in fact, it indicates that it can be so given, as I have argued. In the same way, the Spanish law [*Las Siete Partidas*, Pt. I, tit. ii, law 5] requires no more than that the custom be established with the consent of the prince. With this principle our theory is in agreement, and the law does not say that knowledge or personal consent of the prince is always necessary. If this law [, i.e. *Las Siete Partidas*,] had decreed that the consent of the prince must be of the latter kind, the law of Spain would have been a particular kind of law, and not one demanded by the nature of things, nor of the general type of law.

What consent of the prince is necessary.

The argument from reason for the contrary opinion serves only to prove the first member of our assertion, and to confirm the last. Nor does it hold against our second member, since in that part of our assertion we also say that the authority of the prince is a cause in the establishment of prescriptive custom, and that it does, through the medium of the prince's law, give validity to such custom.

CHAPTER XIV

WHAT SORT OF CUSTOM HAS THE EFFECT OF ESTABLISHING UNWRITTEN LAW?

1. We have discussed the essence and the causes of custom; now it remains for us to speak of its effects. For although we have, in passing, touched upon some of them, we must, to make our doctrine serviceable, apply these principles which have been set forth in a general way to the several effects.

Four effects of custom.

Four effects are usually attributed to custom: namely, the establishment, the interpretation, the confirmation, and the abrogation of law. To these are reduced all other conceivable effects of custom. We shall, however, pass over the third one of these, because its effect is not so much one of law as one of fact; for a custom which is said to confirm law is derived from law itself, and so it does not confirm law by the introduction or the addition of new law beyond the written law, as explained above (Bk. VII, chap. ii, *supra*, p. 450). Hence, it confirms a law by the fact merely that it either brings men more readily to the observance or knowledge thereof by increasing in some way its authority and man's sense of its value; or, at least, by guarding the law against revocation and (as it were) keeping it from the influence of a contrary custom, and so preserving it from the abrogation which might be effected by such a custom. I have discussed this effect also, *supra* (Bk. I, chap. xi),[1] nor is there need for us to add here to the further remarks on this matter, given in Books Three[2] and Four,[1] in our discussion of the acceptance of human law.

828

The second effect, however—namely, the interpretation of law—inasmuch as it can pertain to law, is, as I shall show,[3] included under the first effect. Thus, the two remaining effects alone need to be explained; and we shall speak of the first one in the present Chapter, and of the last in a later Chapter.[4]

2. The first effect, then, of legitimate custom, is to establish unwritten law where neither written nor traditional law exists. I repeat 'where no written [. . .] law exists' because if there precedes, in point of

[1] [Not included in these *Selections*.—Tr.]
[2] [Only Chapters i–iv and xxxii–xxxiii of this Book are included in these *Selections*.—Tr.]
[3] [In Chapter xvii of the present Book.—Tr.]
[4] [Chapter xviii of this Book.—Tr.]

time, a written law in conformity with custom, and if the custom grows out of this law, then the custom does not, as I have said, establish law. If, however, a law contrary to the custom exists first, then such a law must first be abolished, as I shall prove in the following Chapters. Our assertion, therefore, applies properly to custom which is outside law,[1] one, namely, that is neither forbidden nor prescribed by a legal rule.

I have added also, '[. . .] nor traditional law exists', since not every unwritten law is a law of custom: that only is such which has its origin in the general conduct and usages of a people. For sometimes, although it may not be written, the law may derive its origin from the prince himself, or from the [ruling] prelate, who enjoins, at least orally, that a precept of a general and enduring nature shall be law; and that law may be preserved subsequently, solely through the usage and tradition of his subjects. This will also be unwritten law, but it will be the unwritten law of tradition, not of custom. Of this character are many laws of the Church, which are in force through tradition, as I have indicated, *supra* (Chapter ii, p. 450).

It is necessary, therefore, in order that a custom of fact may introduce that form of unwritten law which is called the law of custom, that there be previously in existence no law [on the matter in question] laid down by the superior either in written or in oral form. Thus defined, our assertion on this point is certain.

This doctrine is found in both canon and civil law (*Digest*, I. iii. 32 *et seq.*, and *Code*, VIII. lii, in entirety, and the whole title of *Decretals*, I. iv, and of *Sext*, Bk. I, tit. iv). It is assumed in *Sext* (Bk. I, tit. ii, chap. i), and in *Decretum* (Pt. I, dist. i, can. v, and Pt. I, dist. viii, can. vii). Again, it appears throughout *Decretum*, Pt. I, dist. xi, where in canon vii, Augustine, *Letters*, lxxxvi is cited; again in *Decretum*, Pt. I, dist. xii, can. xi where [Augustine,] *Letters*, cxviii, chap. ii is cited; and Tertullian (*On the Soldiers' Chaplet*, Chap. iv) says that, 'custom is received as law even in the civil law when the latter is wanting'.[2]

Augustine.

Tertullian.

The Doctors in theology are in accord upon this point, as well as the jurists of both canon and civil law, and it is the general teaching of the Church, respecting which doubt is not permissible.

3. The ground in reason for this assertion may be given as follows: in a legitimate custom, all the elements essential for the establishment of a true precept or law can be present; therefore, it is able to establish law. The minor premiss is proved first by the fact that three or four elements are necessary and sufficient for law: namely, fitness of subject-matter, power, and will

Proof of the assertion.

[1] [The reader will remember that customs are, *iuxta*, *contra*, or *praeter legem*: i.e. in accordance with, contrary to, and outside law. It is the last kind that is neither prevented nor forbidden by any existing law.—Reviser.]

[2] [Tertullian has *cum deficit lex*.—Reviser.]

sufficiently manifested externally; and all of these can be present in this kind of custom.

The fitness of subject-matter in this case is evident, for the custom in question should be reasonable; but it will be such in relation to this effect, provided its subject-matter is not opposed to natural or divine law, and if it is useful for the general welfare, and not excessively onerous, or a deviation from the general mode of upright living; and finally, it should be such that a written law enacted in this matter would be just, as I have stated in a previous Chapter (Bk. VII, chap. iii *supra*, p. 455). In respect of subject-matter, therefore, a reasonable custom has a fitness for the establishment of law.

Whence, the gravity of the law will be in proportion to that of its subject-matter: for if its matter is serious, the precept will be a grave one, binding under pain of mortal sin; if, however, the matter is not thus serious, the law will be law only in a limited sense, imposing a light obligation. Again, if the subject-matter pertains to spiritual welfare, the custom will belong to the ecclesiastical jurisdiction; but if it relates to temporal good, it will pertain to the civil jurisdiction, as I pointed out above. Finally, as touching this element of subject-matter, the custom will preserve in all respects an analogy with the written law.

4. On the second element necessary for law, it is evident from the discussion of the preceding Chapter that power is not lacking for the establishment of this kind of custom.

Authority requisite for the validity of a custom.

For a legitimate custom proceeds either from a free people, and hence from one having supreme power, and, therefore, the power of enacting law; or from one having a pastor or prince by whom it is governed. In this latter case, if a legitimate custom is thought of —as it should be—as proceeding not from a people regarded apart from its sovereign, but from the people jointly with its head, and displaying in some sufficient way his influence, either by his having given the people the power to make its own municipal laws or statutes, or by his approval of the custom, an approval given either by law itself [cf. Chap-
829 ter xiii, this Book], or by his proved tacit will, then in a people thus conjoined with its head there resides sufficient power to make laws, as is evident. Therefore, . . .

It is usual to inquire at this point, whether one family can establish a custom through a continuous succession, and in so far as the family is regarded as perpetual. But I have just stated above that a true custom is not established by a private family. Hence, even if a family remains always in existence, the fact is of no importance, because a custom never can originate from that source, nor, therefore, can it be continued in existence. Again in the Ninth Chapter of Book One of this treatise,[1] it was proved that one family has neither the authority

[1] [This is found in Chapter vi of Book I, *supra*, p. 73.—Tr.]

to make law, nor the capacity to receive law, save by way of privilege. Hence, it cannot introduce law by its own custom, even though it may acquire a privilege, as I shall state below. Rochus (*De Consuetudine*, Sect. 4, nos. 6 [nos. 62] *et seq.*) has much to say on this matter, as has Antonio Gabrieli ([*Communes Conclusiones*,] Bk. VI, tit. *De Consuetudine*, concl. 5).

Rochus.

5. The same conclusion holds with regard to [the third element for the enactment of law,] the element of will. For, in free peoples, it is to be supposed that the greater number of the people and the magistracy concur voluntarily in a custom. In other communities, the consent of the prince, expressed in one or other of the modes we have spoken of, is added to the will of the people or to that of the greater number. Thus, always, there concurs [in the introduction of custom] the sufficient will of one who has the power of making law.

Of the will requisite for the establishment of custom.

We need only note at this point that although the will of the prince or that of the prelate is the principal one in this matter, nevertheless, in a certain sense, more depends upon the will of the people. The reason is that it is to the will of the people that the prince (so to speak) conforms by granting that people permission (as it were) to introduce such legal custom as it may wish; or by approving of the popular intention, or confirming it.

Therefore, in respect of this effect, it is of the first importance to note that it is not enough that certain acts on the part of the people are frequently performed, from which results a custom of fact; but that it is essential that this very custom be intended by them; so that the acts are thus repeated to establish that custom for the common good, or for the integrity of religion, or for some like virtue which it contains. This is explicitly taught by the Glosses and the Doctors to be cited forthwith.

Glosses.

We have shown above that this last factor is of the essence of custom: since a custom cannot be voluntary except in so far as it is intended. This can also be shown from the nature of law; for it is of the essence of law, that its enactment be intended by the sovereign. But whatever is of the essence of law in general, or of positive law [in particular], is of the essence of legal custom also; for what is of the essence of the genus must be included in the species. It is on the ground of the truth of this principle that I advise that attentive thought be given as to whether the customs in question are intended as such, or whether they come into being in some other way; for if the customs come into existence in the latter fashion, they are not properly legal customs carrying a binding obligation of law. Thus, there is a general custom that sleep intervenes between the evening meal and holy communion: this, however,[1] was not intended in itself, but arose out of the ordinary habits of men's lives. Whence this sort of custom, as I have elsewhere remarked, does not establish any obligation.

It is of the utmost importance to note whether the custom as such was willed.

6. Furthermore, not only an intention to establish a custom of fact is required, but also one to make a legal custom, or (what is the same thing) to establish a custom that is binding. For these two sorts of custom are quite different in character; since a custom can be directly intended, and yet intended not as binding, but to be observed out of devotion, and as a matter of perfection. This is evidently the case with personal and private customs, but the same can be true even of the customs of a whole people. Thus, there prevails among Christian peoples the custom of paying honour to the Blessed Virgin at the sound of the evening bell,[2] which is practised out of devotion only, and not under obligation. Bellarmine (*De Romano Pontifice*, Bk. IV, chap. xviii) held that many of the customs observed among Christian peoples are of such a character; that, for instance, of receiving [on the forehead] the blest ashes on the first day of Lent, and that of receiving a palm on Palm Sunday, and of taking holy water at the door of the church. Such also is the custom among many peoples of going to church at daybreak, as is also the practice of hearing Mass for devotional reasons on days that are not holy days of obligation, and such also is the custom, on feast-days, of not taking breakfast before Mass. These customs, and others like them, even though they are practised by a majority of the people as a matter of devotion, establish no obligation in law. Indeed, Soto (*De Iustitia*, Bk. IX, qu. III, art. i) includes in this class even the custom of presenting offerings at the church for [Masses for] the dead on All Souls' Day; and this is also probably true of other voluntary offerings, except when the church shall have obtained a prescriptive right to such donations, as I have stated in my treatise on religion (*De Religione*, Tr. I, bk. II, chap. v [Tr. II, bk. I, chap. v]).[3] I have noted there, with Cajetan and Soto, that an examination must be made of the intention with which the customs were introduced, for if they begin from a motive of devotion, and continue as such, they do not establish a true [legal] custom.

What must be the character of the will to establish a custom.

Bellarmine.

Soto.

Cajetan. Soto.

836 7. Hence, the Gloss (on *Decretum*, Pt. I, dist. VIII, can. vii), says that for a [legal] custom it is essential that it be observed with the will and intention that 'it become a law for posterity'. The same statement is repeated in another Gloss (on *De Consuetudine*), on which Abbas [, i.e. Panormitanus,] also, comments (*ibid.*, no. 17) to the same

Gloss.

Abbas.

[1] [Reading *at* for *ad*.—Reviser.]

[2] [i.e. the Angelus. The custom was to sound the bell half an hour after sunset. This was called the Evening *Ave* or the Angelus, from the opening word of the salutation. *Angelus Domini nuntiavit Mariae*. —Reviser.]

[3] [Not included in these *Selections*.—Tr.]

effect: 'that it [, i.e. the factual custom,] must be observed with the intention of establishing a [legal] custom.' Rochus Curtius sets forth the same view thereon at length (*De Consuetudine*, Sect. 4, no. 36), and cites the authority of other writers for his opinion.

The reason on which this opinion is founded is also clear: the acts of those observing the custom cannot have an effect not included in their intention. Again, it is of the essence of law that it is made to bind those subject to it. Likewise, no one puts himself under a strict obligation unintentionally, as is clear in the case of a vow, or of a promise. And although a people that lives under a superior may seem to bind itself not by a custom, but rather by unwritten law, and therefore by the will of its sovereign, nevertheless, since the prince does not wish to impose a greater obligation through custom than the people are willing to bear, an intention on the part of the people to establish, in so far as they have power to do so, a true custom and its accompanying obligation is an essential condition of such a [legal] custom.

The evidence of a will to establish a custom.

8. Finally, the evidence of this will and of this obligation is the custom of fact itself. For thus Julianus asked in his commentary (in the *Digest*, I. iii. 32, § 1): 'What difference does it make whether the people declare their will by a vote, or by facts and deeds?' Other laws are of the same tenor. Lastly, the custom [of fact], from common acceptance and as a kind of natural token, has come to be received as evidence sufficient to indicate such a will of the people, when it has been continued for an adequate time, and by a sufficient frequency of actions. A special difficulty, however, respecting this intention and its tokens, we have not touched upon here, since we shall be able to do so to better advantage in the following Chapters.

CHAPTER XV

HOW LONG MUST CUSTOM ENDURE IN ORDER TO SUFFICE FOR THE ESTABLISHMENT OF LAW?

Of the time required for the establishment of a custom.

1. In the preceding Chapters, we have sufficiently discussed the number and frequency of the acts adequate for a custom, and now it remains only to speak of the length of time necessary for the same. For although we have pointed out that one sort of custom is established by prescription, and there is another that is not so established, we have not explained in what way these types of custom suffice for the establishment of law; nor how much time each requires for that effect. We must, then, take up these points in the present Chapter.

A prescriptive custom is of itself sufficient to establish law.

2. In the first place, it is certain that a prescriptive custom is sufficient of itself for the introduction of law. This is clearly inferred from the *Decretals* (Bk. I, tit. IV, chap. xi), as I have explained in a former Chapter, in accordance with the common teaching of the Doctors cited therein.

First opinion.

But as to the time that is necessary for such prescription, there are various opinions. Some ancient writers demanded an immemorial length of time; but this opinion is without adequate basis, and has been abandoned as obsolete.

Second opinion.

Others require a space of forty years in the case of a canonical custom, as did Hostiensis (in *Summa*, on *Decretals*, Bk. I, rubric iv, § *Obtentum* [, no. 3]). But this rule has application to those customs which are contrary to law, not to those which are outside law.

True opinion. A period of ten years is requisite and sufficient.

Whence, for the latter sort of custom, ten years is held to be necessary and sufficient, even where canonical subject-matter is concerned. This was the teaching of the Glosses referred to above, and that of Bartolus, Panormitanus, Rochus, and others in passages frequently cited. The same is held by Covarruvias (*Variarum Resolutionum*, Bk. I, chap. xvii, no. 8, § *Quarto*), who refers to these and other writers, and Navarrus (in *Summarium de Consuetudine*, Consil. I, chap. xiii, no. 19).

Glosses. Bartolus. Panormitanus. Rochus. Covarruvias. Navarrus.

The proof of the first part of our assertion is that the laws declare that a custom which is ancient, or of long standing, is sufficient to establish a legal rule; and ten years are necessary and sufficient for a custom to be termed ancient and of long standing. Therefore, . . .

The premisses of this argument call for no further proof here, since we have dealt with them in an earlier passage.[1]

The proof of the second part of our assertion is that the custom in question is not contrary to law, but is, as we assume, outside of law. But we know from the matter of prescriptions that for those prescriptions which are not contrary to law, no more time is required in the canon than in the civil law for establishing the prescription; and in respect of this condition of the time requisite, a prescriptive custom follows the mode of a prescription, as I have said above. Therefore, . . .

A note.

3. I note, however, that the phrase 'a long time' is not, in the eye of the law, a single, fixed measure of years [, but one that varies]: when the parties to the prescription are present, ten years, and when they are absent, twenty years[2] (*Institutes*, II. vi, § 1 [II. vi, Pref.]). Nevertheless, the above-cited Doctors make

[1] [*Supra*, Chap. viii.—Tr.]

[2] [This was the rule of Justinian regarding real estate, which was acquired by possession for a long time, that is, after ten years, where the parties are present, and after twenty, where they are absent. It was provided that personal property, however, should be acquired by use for three years' (*Institutes*, II. vi).—Tr.]

no distinction between a prescriptive custom when parties are present and such a custom when they are absent; they do not, that is, require twenty years for the latter, and ten, for the former, but lay down the absolute requirement of ten years in all cases. Indeed, Bartolus (on *Digest*, I. iii. 32, in *Repetition*, no. 14) expressly states that in the present matter, that distinction is not to be made, for the reason that ' "absent parties" can have no place here, since the people (as a whole) are always present, even if some of them are absent'. In these words, he indicates that this kind of custom is not obtained by prescription against people of other countries, but is established among the citizens themselves, who must be present at least in the majority, since, as we 831 have said above, they must have knowledge of it, if the custom is to be valid. Gregory López ([on *Las Siete Partidas*,] Pt. I, tit. II, law 5, gloss 4 [gloss 5, *glossa* a]) and Burgos de Paz (Law 1, *Tauri.*, no. 207) subscribe to this opinion.

Bartolus.

Gregory López.

Burgos de Paz.

But this reasoning does not seem to be altogether adequate; since, as I have said in an earlier passage, this custom, in its own way, is acquired by prescription against the prince, and he may be absent or present, and so in respect to him the prescription of this custom ought to require a length of time in proportion to that of a true prescription. Therefore, when the prince is absent, a period of twenty years ought to be necessary.

4. For this reason, other authors think that this distinction ought to apply also in the matter of our present inquiry. This is the view of Sylvester (word *consuetudo*, Qu. 2), and it is recorded by Hostiensis (in *Summa*, on *Decretals*, Bk. I, rubric iv, no. 3). He states in this passage that some of the canonists also held this opinion, and that many jurists take the same view with regard to civil customs; and refers [in particular] to Azo (in *Summa* on rubric of *Code*, VIII. lii). And in the aforesaid *Las Siete Partidas* (Pt. I, tit. II, law 5) this distinction is set down, together with the statement that custom is established through usage by the people during a period of ten or twenty years. On the ground of this law, certain writers hold that at least in Spain—because of this special law—such a distinction must be made. They argue that since the distinction in question is not unsuitable or useless, and does no more than require a custom of ten years in the case of present parties, and twenty years in the case of absent ones, this opinion is tenable, with regard to this part of the matter.

Sylvester.

Whether the distinction above made should apply in the present case.

Azo.

5. Nevertheless, I hold that ten years is in all cases sufficient for a custom to be held as establishing law and as being validated by prescription.

Ten years is a sufficient time for the establishment of a custom.

The first proof is that drawn from the common teaching on this matter, which, not without reason,

omits the use of that distinction in the case of prescriptive custom, although it is invoked in the cases of prescription properly so called. The same teaching I find in our Molina (*De Iustitia*, Tr. II, disp. 77), by comparing that disputation (77) with those that precede it and deal with the time requisite for true prescription in various matters.

Molina.

A second proof is the way in which custom is [in practice] accepted so that no account need be taken of the presence or absence of the prince in order to establish a custom by prescription in opposition to a law, a principle admitted by all. I use the words 'to establish a custom by prescription', because as I say below, the absence or presence of the prince may be of great importance in regard to other effects of non-prescriptive custom, and this, not that it is important in itself, but for the reason that his knowledge of the custom may be more readily and more certainly presumed when he is present than when he is absent.

A third and excellent proof is drawn from this last note. It is not required in custom of the latter sort that it be established by prescription with any reference to the prince, save to the extent that he is ignorant of the custom, or can be supposed to be ignorant of it; therefore, the presence of the prince or his absence is of no importance in settling the question of whether this custom may be established by prescription within such and such a time. For if the prince himself is acquainted with the custom, whether he is present or absent, the prescription is not necessary, as I say below. If, however, he is ignorant thereof, it is of no consequence that he be present, since although he be present in body, he is not so in mind, and hence the prescription will be established in as short a time against an absent person, as against one who is not aware of it, since such a person in either case is absent.

6. One may object that, in regard to a prince who is present, the presumption is that he can more easily have knowledge of a custom, and hence a shorter time ought to be sufficient for his gaining such knowledge. Again, if that proof [set forth above, to which objection is here made,] were valid, it would be more true to say that a period of twenty years is always necessary, since this prescription is always against a person formally absent, that is, against one who is unaware [of the custom].

An objection.

My reply to the first part of the above objection, is that in this kind of prescription attention is to be paid not to the ease or difficulty in the acquisition of knowledge of the custom on the part of the prince, but to the necessity of the common good which is served by the prescription. For it is very expedient for the general welfare that the people observe customs that are reasonable and confirmed by sufficient usage, and to this end it is fitting in the highest degree that such customs have the binding power of law. Prudent men, therefore, realizing this need, hold that a period of ten

The solution.

years is sufficient [to establish a legal custom], irrespective of the presence or absence of the prince.

The ground in reason in this case is that a custom of this sort is of itself adequately confirmed, and the time allowed for its introduction is ample, in any case, for the prince to have knowledge of it, if he wishes to do so; a greater or lesser ease [in his obtaining such knowledge] would seem to be of no importance. And this is the more true because, in the prescription of a custom, the prince is not to be considered as having a will in opposition to the movement, especially with regard to this effect of bringing in an obligation not contrary to his law; he is not, that is, in the situation of the owner of a thing against whom a prescription is acquired. The reason is that the bringing in of this obligation is in no way prejudicial to the prince, nor is it counter to his jurisdiction, since it is an outgrowth of his law and useful for good government. Thus the character of this custom is not that of prescriptions in other subject-matters. 832

And so we answer the second part of the objection by denying the conclusion. For, since the laws lay down no distinction on this point, but demand only a 'long-continued' custom, the shortest period within the meaning of the phrase 'a long time', is to be understood here. And this for two reasons: because this is the more favourable interpretation and the one to be followed where there is question of the common good; and because, in respect of prescriptive custom, it is only the ignorance of the prince, whether he is absent or present, that is to be taken into account. This is not true of prescription properly so-called, for the same length of time suffices, other things being equal, whether the owner of the thing has knowledge of the usage of the person acquiring the prescriptive right or not.[1]

The contrary opinion of some Doctors does not affect this reasoning.

7. We need not consider at length the views of the authors cited for the opposite opinion. They are, in the first place, relatively few in number; and again, even of these, some authors are probably discussing not legal custom alone but custom in general, as it includes that by which prescriptions are acquired. This, as I have remarked before, is the common practice of jurists. Certainly, it is the practice of Sylvester in his discussion on the word *consuetudo*, and of other summists and jurists—as will be clear to any reader of their works. It is for this reason that they discuss custom under this distinction, and not because they believe it should be applied to every kind of custom, even to custom in regard to moral acts. Sylvester.

It was in this sense, perhaps, that King Alphonso spoke in law 5 [of *Las Siete Partidas*, Pt. I, tit. II]. But this also bears, as I shall indicate in the next Chapter, another interpretation. Or, if he wished to intro-

[1] [In ordinary prescriptions, however, the consideration of presence or absence of the owner of the thing is important.—Tr.]

duce new law and to approve the opinion of Azo—whose works are said to have been the source of the laws of *Las Siete Partidas*—then that special law was, in my opinion, brought in not by custom, even in Spain [, but by enactment of the king].

8. It remains for us to discuss custom that is not validated by prescription. For sometimes such custom can suffice to establish law; and consequently it is possible that this result may be effected in a shorter period than ten years, in cases where a knowledge of the custom on the part of the prince is present. This was the opinion of Antonio de Butrio (*De Consuetudine*, Chap. xi), St. Antoninus, Sylvester, Angelus de Clavasio and others who agree with him, as we shall see when we discuss a similar question in a following Chapter. For these writers distinguish between a prince who is aware of, and one ignorant of, a line of conduct of the people; and they hold that a shorter time is required when the prince knows of the custom than when the opposite is true. But a custom of ten years is sufficient to establish law, even when the prince has no acquaintance with the custom: hence, a shorter time will suffice for that effect when he has knowledge thereof. But a prescriptive custom is not established in a period shorter than ten years. Hence, a non-prescriptive custom, which is known to the prince, can introduce a rule of law. Thus, we see the occasion when a prescription is required, namely, when the prince is ignorant of the custom; also, when a prescriptive custom is not necessary, that is, when the prince is aware of the custom. The reason for this distinction is that although the laws say that a custom of long standing is sufficient, they never state that one of a shorter period is not sufficient. Antonio de Butrio. St. Antoninus. Sylvester. Angelus de Clavasio.

And, to take another ground, a custom of a shorter period will, in the nature of things, suffice for this effect, if the prince is aware of the custom. The reason is that under these conditions a custom of shorter duration can reveal adequately the consent of both the prince and the people, as appears evident. Therefore, a non-prescriptive custom may be sufficient, since the sole requirement is that there shall exist adequate evidence of the will of the legislator. And this is the difference that marks these two kinds of custom: that a prescriptive custom establishes a legal rule, not because it is evidence of a fresh consent of the prince, but because it includes all the elements required by law, in which a previous will of the sovereign is included. For it, therefore, no new knowledge of the custom on the part of the prince is called for, nor is the consideration of the possibility of his having such knowledge relevant here. But a non-prescriptive custom can operate only as a token of his will and as a sign of a fresh consent on his part; and this may be given to a custom of shorter duration, of which the prince has knowledge. It is self-evident that there never can be any evidence of such will and consent on the part of a sovereign ignorant of such a custom.

9. But the question may be urged, what period of time under ten years is adequate for the establishment of a custom of this kind? My reply is that a definite term cannot be fixed by any conclusive reasoning, both because the law is silent on this point, and because this signification [of consent]—since it is expressed through facts—depends upon inferences which are not equally valid in the case of all customs. And so the evidence of the prince's consent can be adequately manifested in a shorter period in the case of some customs, than in that of others. For some customs are made up of actions which are repeated more frequently, and are of a character more general and more public than is the case with others; and so, other things being equal, in the case of those customs, the fact of the sovereign's knowledge will be more speedily established, and thus—if he voluntarily tolerates the custom—evidence of his tacit consent is given.

The term of observance for the validation of a custom in less than ten years is not a fixed one.

Again, for establishing a presumption of the prince's consent in such cases, his presence or absence may be factors of great importance: for he is presumed to know what happens in a locality in which he is present, 833 but not what is done in his absence, unless other proofs are available.

Furthermore, for calculating the probabilities in the case of a custom of this kind, certain considerations brought forward in our discussion of judicial acts[1] may be of use. Thus, especially, a decision handed down in favour of a custom, if it be published and confirmed by the sovereign prince, would be fully sufficient evidence of his consent. Indeed, even if that opinion were known as having been given by a judge of a lower court, and were tolerated, it would be of no slight force as evidence.

Evidence of proof of custom.

Likewise, a judicial decision by any prudent judge at all may, of itself, give authority to the custom, since it is possible for the decision to be a just one, in view of a custom that is not prescriptive. The reason is that since the establishment of such a custom does not call for a fixed length of time, but depends rather upon certain probabilities in the situation, a decision in favour of the custom may be given on grounds of prudence and of the probabilities of the case, and so the custom, although it has not been validated by prescription, is held to be adequate [for the bringing in of law], on the ground that it is an adequate indication of the will of the prince and of the people. Whence, although such a decision is in itself not absolutely necessary for the validity of the custom in question—because this validity is itself assumed as the ground of the decision, and is but declared by it, as we have argued above in a similar case—nevertheless, if such a decision has at some time been delivered, it confirms in a high degree the probable validity of the custom. And if it be many times repeated, a strong moral certitude

[1] [See Chap. XI of this Book, *supra*, p. 534 *et seq.*—TR.]

will exist in favour of the custom, for it will have been greatly confirmed by the testimonies of prudent men.

Finally, we can apply to custom of this sort the opinion of Soto and other writers [*supra*, p. 508], who say that the length of time necessary for the establishment of custom must be determined by the judgment of prudent minds, at least, when it is a question of interpreting the mind of the prince and of the people. The authority of the writers can, therefore, be cited in support of this part of our argument, for they clearly assume that a non-prescriptive custom can have the force of introducing a rule of law.

In what sense the opinion of Soto is to be applied here.

10. One difficulty arises, however, from the foregoing discussion: a custom of fact can never, it would seem, be a satisfactory indication of the will of the prince and of the people. For, as has been said, a custom ought to arise out of an intention to establish consuetudinary law, and such intention can never be sufficiently inferred from a mere repetition of like actions unless that intention is expressly declared, since the same acts could be repeated in the same manner without that intention. It is to be added, as I have noted in my work, *De Religione* [Tr. II, bk. I, chap. V],[1] that even though a custom may have its origin in a devotional practice, that intention can easily be changed later, and the very same actions may be done with a purpose of creating an obligation, even if no change is evident in the actions themselves. This difficulty is more a practical than a speculative one, and it has application as much to a prescriptive as to a non-prescriptive custom.

A doubt.

For a custom will never establish a rule of law by prescription, even if it lasts for a thousand years, unless the frequency of the acts arises from the intention of creating a legal obligation. Indeed, I think that it is even necessary that the custom be observed with that intention during the entire period of ten years, since otherwise, the customary actions cannot be said to concur as an expression of the popular consent essential for establishment of the custom by prescription. By what test, then, is this intention to be recognized?

The acts constituting the custom must be repeated with the intention of establishing law.

11. This question is touched upon by Angelus de Clavasio ([*Summa,*] word *consuetudo*, nos. 4 and 5), and he says in effect, that it must be decided on the basis of the frequency with which the actions are repeated and their number, or the fact that they are of a public character and widely known, and done with the consent of the people. But these tests and others like them do not solve the difficulty, since they may apply not less to a simple custom observed out of a devotional or other voluntary reason, than to one observed with the intention of establishing a binding rule of consuetudinary law.

Angelus de Clavasio.

[1] [Not included in these *Selections*.—TR.]

Rochus.

Gloss.

Rochus proposes the same doubt (*De Consuetudine*, Sect. 4, no. 36), when he deals with the seventh requisite for custom, and refers the reader to question 6, after the Gloss, namely, to Sect. 5 from no. 10 onwards. In no. 27 of this Section he again proposes the question clearly, and he says merely that in the case of doubt it must be judged that each person observing the custom is to be held as acting with the intention of introducing a [legal] custom, when he does the act as by right, that is, in the belief that he has the right to act thus in future. But as to when a person acts, as though exercising a right, Rochus says this must be determined from the nature of the acts. Thus, if the acts are of the sort that are usually done out of pure friendship—as dining in the house of a friend—even if they are repeated many times, they are not regarded as done with the intention of establishing a right; the case is otherwise, however, with regard to actions which are wont to postulate a right. For this opinion, Rochus cites many Doctors.

But, in the first place, that rule, this method of interpretation, and these examples, seem to have reference rather to custom in virtue of which a prescriptive right is acquired, than to legal custom. For in the first case, the party observing the custom is presumed, when a doubt is to be settled, to be seeking or exercising his own right, because that right is useful or favourable to himself; but why, in the case of legal custom, is it to be presumed that any one in doubt would wish to establish a rule of consuetudinary law which is burdensome and inconvenient to himself? Again, in the present subject-matter, the nature of the actions cannot be used as a test of the probable intention of the agents; for the same acts are, from their very nature, such as may be performed, either out of devotion, or as a following of a counsel [of perfection], or as the fulfilment of a precept—as are evidently the making of offerings in the church, or fasting, or the observance of feasts [of the Church year], and the like.

Peter of Ravenna.

834 12. Finally, the same question is propounded by Peter of Ravenna (Tr. *De Consuetudine*, Sect. 1, no. 15). His sole reply is to appeal to those points of doctrine concerning the prescription of incorporeal rights, which are treated by Innocent [IV] (on *Decretals*, Bk. I, tit. v, chap. iii, and other places), and by Bartolus and others. All these writers have in mind prescription properly so-called, in which it is easier to discern whether a usage is one of law or simply one of permission, in which, in case of doubt, the party using the prescription is presumed to intend possessing the right of ownership, or of the servitude, or the like. But this does not hold in the matter at present in question—for the reason we have already given.

Innocent.

Bartolus.

We must note also that the authors cited treat especially of the proof of a custom in the external forum; we, however, are dealing with

the forum of conscience. In that forum a judgment on a prescription and on its usage is more easily arrived at. The reason is as follows: the one who establishes a prescriptive right is either a private individual, in which case he will be the witness of his own intention, or else some community, in which case the judgment of the conscience rests not upon the community as such, but upon individual members thereof; however, the individuals, in turn, can and ought, in conscience, to presume the right on behalf of the community, as is clear from the reasons we have already given. A legal custom, however, always depends upon the intention of the people as a whole, and individuals are, therefore, not bound to presume an intention of establishing a legal precept; and this because such a precept is not favourable, but burdensome to the community.

A distinction to be noted.

13. I say, then, that it is not easy to judge of the obligation of a precept established through a custom, and that in a case of doubt, other things being equal, it is wiser to incline to the judgment that the custom is observed rather out of devotion, or rectitude, or perfection, than for the purpose of establishing a legal obligation. It is a general rule that, in a case of doubt, no one is presumed as willing to be bound, as I have noted in the treatise on the matter of vows.[1] Again, it is not expedient that precepts be multiplied where they are not morally certain, or at least not highly probable.

When there is a doubt, a custom should be regarded as one of devotion, or of rectitude, rather than as a legally binding rule.

I note further that judgment as to the manner of introduction of a custom, and the intention with which it has been introduced, must be left to the discretion of prudent minds; and that no more definite rule can be laid down here, since the law makes no disposition in this matter, and the subject is in itself elusive and obscure, as the difficulty we have just discussed shows.

The mode and intention with which a custom has been established is to be left to the judgment of a prudent man.

However, in any inquiry as to the intention with which a custom is established, the following criteria will be of assistance.

First, if the custom is of long standing, and has to do with matters onerous and difficult, and if, finally, the custom is observed by the major part of the people—since the people do not commonly agree in the performance of acts of this sort save when they feel an obligation to do so—we have sound evidence that the people then are led [to act as they do] from a sense of obligation that is already established or is being established by it.

First criterion.

Secondly, if prudent and conscientious men think ill of those who do not observe the custom, or if the people generally are scandalized at non-observance of it, we have

Second criterion.

[1] [Not included in these *Selections*.—Tr.]

another strong indication of an intention on the part of the people to introduce consuetudinary law.

Third criterion.

Thirdly, if the prelates or the governors of the realm gravely censure and punish those who do not follow the custom, that also is no slight indication.

Fourth criterion.

Fourthly, if the subject-matter of the custom is evidently of itself of such advantage to the state that it may be prudently held that the binding force of the custom is highly expedient for the general welfare, the presumption is admissible, in a case of doubt, that the custom has been deliberately introduced.

CHAPTER XVI

CONCERNING THE CAUSES AND EFFECTS OF UNWRITTEN LAW INTRODUCED THROUGH CUSTOM

1. Reference to the principles that we have already set forth in our discussion of written human laws makes lengthy treatment of our present question unnecessary. For it is clear from what we said there that, generally speaking, everything which has been set forth concerning the causes and effects of human law, holds, in due proportion, for law introduced through custom, with the exception of such assertions as touch upon the material or sensible form of the law, and its promulgation. The reason for this qualification is evident, since this consuetudinary law of which we are speaking is not essentially different from written law, and is so only in the kind of outward expression by which in it the will of the legislator is manifested—which expression I call the sensible form of that law. For in law, strictly so called, the will of the legislator is given outward expression in some form of writing, or, at least in an express statement made by him; in consuetudinary law, however, neither a written nor an oral expression of that sort has place, rather it is manifested in the form of external acts, as has been explained.

It is for this reason that in the case of law [strictly so called] in addition to the enactment of the law by the legislator, its promulgation is required; for the enactment of the law is not in itself a public expression unless knowledge of it is spread abroad. A custom, on the other hand, is itself an outward expression, of its very nature public,

Custom, as a public token, is its own promulgation.

and known to the people observing it; and hence it does not need any other promulgation. The reason is, as I shall point out more fully in a moment, that a custom binds only a people which makes use of it, and so there is no necessity for any other promulgation or publication. For in order that a custom be extended to other peoples, it is necessary that they 835

adopt and copy it; and thus, this imitation will effect among them the introduction of a like custom and promulgation. If, however, one people adopt the custom of another people, not through a custom of its own creation, but through a statute directing the observance among them of a custom practised elsewhere, their law will then be not consuetudinary, but written law, and will, as such, require its own form and promulgation.

But in the other causes [that are essential for law], when due proportion has been observed, there is no difference between these laws [, i.e. written and consuetudinary], since, as I have said, their subject-matter should be morally good, adapted to the public weal, and finally, reasonable. And thus it is clear that reason is (as it were) the soul of both kinds of law, and that both are chiefly dependent upon the will of the prince who possesses the power of legislation; a power which is, in the case of each kind of law, the true efficient cause, as the will [of the prince] is (so to speak) the substantial form.[1]

2. In the same way, we can deal with the effects [of consuetudinary

The effects of custom may be inferred from the foregoing discussion.

law]. For custom is, of its own virtue, binding in conscience, since it is true law (*Decretum*, Pt. I, dist. XI, can. vii). This is the common teaching of the Doctors, as may be seen in Felinus (on *Decretals*, Bk. IV, tit. I, chap. i [, no. 18]) and in Rochus (*De Consuetudine*, Sect. I, nos. 12 and 13), who cites other authorities. So also the obligation of the law of custom will be serious or light according to the character of the subject-matter, unless the will of the people to the contrary is manifest on this point; for, in this respect, all the principles that have been set forth on the obligation of human law in written form can be applied as well to legal custom, since they have—with due proportion—the same bearing upon it.

Felinus. Rochus.

3. But the question may here be asked, whether consuetudinary

Custom can establish penal law.

law can be binding under a penal sanction, that is, whether it is possible for a custom to establish a penal law. This question can be briefly answered in the affirmative, since what holds true of law in general, holds true of a penal law as well. For what absurdity in reason can be shown in the possibility of a custom binding under a [physical] penalty as well as under [the moral one of] guilt? Indeed, by the very fact that it binds under penalty, it makes the transgressor of the custom liable to penalty; for this liability follows naturally from the guilt. So, for a like reason, determination of the punishment might be established by the same custom; as, for example, that whoever should violate the custom in question could be punished in a certain manner. Thus, the penalty would be just, being fixed (as it were) by the law of custom.

[1] [That by which a thing is what it is.—TR.]

Innocent. Abbas.

An example in point is at hand in the *Decretals* (Bk. IV, tit. xi, chap. iii), and in the commentaries of Innocent, Abbas [, i.e. Panormitanus], and others on that Chapter. They are there discussing a custom in which one or another non-essential usage in the ritual of the Sacrament of matrimony is observed, and according to which those who have been married otherwise [i.e., without fulfilling the rite] are to be separated for a time as a punishment for their previous departure from the customary rite. These authorities hold that this custom is in both respects a just one, and therefore to be observed.

Likewise, a custom may, not less than the written law, fix the price of some article of merchandise; hence, it may also fix a penalty for a crime. This is the general teaching of writers on penal custom, as may be seen in Rochus (*De Consuetudine*, Sect. 4, nos. 20 *et seq.*), where he cites many others.

A custom can establish a purely penal law.

Again, it is my opinion that custom can establish a law of a purely penal character (as it were) by reason of which anyone not observing it may be subject to some punishment, even if no guilt is contracted from his act. On this point, the same reasoning holds for custom as for written law. In that case, however, this sort of custom would seem to be a kind of prescription rather than a law; it would seem, that is, to be rather a kind of tribute which the state or the prince has, through custom, acquired the right to demand under certain conditions.

It could, finally, be established by a custom that whoever did not observe it should be bound in conscience to make reparation, even though no punishment followed, and thus the true character of legal custom would be preserved. Such customs, however, rarely or never occur.

Sánchez.

4. The question is also raised frequently, whether consuetudinary law can extend to the effect of invalidating a certain act or contract, or of rendering individuals incompetent for the performance of such acts. This question is usually treated more explicitly in connexion with the matter of matrimony, as Sánchez shows at length ([*De Sancto Matrimonii Sacramento*,] Bk. VII, disp. iv). The principles, however, there given are nearly the same as those that apply to other forms of contract, as Felinus points out (on *Decretals*, Bk. IV, tit. i, chap. i, nos. 2 and 3).

What is the force of custom in respect of the validity of a contract?

Hence, we assert that a custom forbidding certain actions or giving [legal] form thereto, can be introduced with the intention and will that acts done otherwise shall not be valid, and that such a custom, if it be reasonable and be secured by prescription or have the express or tacit approval of the prince, shall have the effect of voiding such a contrary act.

This is the teaching of many Doctors, to whom Felinus and Sánchez refer in the passages above cited, and it is founded upon the *Decretals* (Bk. IV, tit. xi, chap. iii), where (according to the plain
836 context and the truer interpretation) it is assumed that an ecclesiastical custom can introduce a diriment[1] matrimonial impediment, and that those who have contracted a marriage in defiance of the custom are on all accounts to be separated. The same inference is to be drawn from Chapter One of the same Title where [for this effect of a diriment impediment] a custom is specially postulated that would cause scandal, that is to say, the violation of which would cause scandal, and this additional [characteristic] is particularly noted and required by the canonists. But, if the custom be of the sort that introduces a diriment impediment to a marriage, the violation of it cannot but give rise to scandal, and thus scandal is invoked as an indication that such a custom obtains.

An opinion of the canonists is rejected.

I disapprove, therefore, of the assertion of certain canonists, that in the foregoing and in similar cases this effect arises more from the necessity of avoiding scandal than from [the legal force of] the custom. For true marriages are not dissolved in order to avoid scandal, nor could the circumstance of scandal void a marriage, unless an impediment were assumed, or a voiding law had been introduced by custom.

Gloss. Gloss.

5. A similar inference can be drawn from the *Decretals* (Bk. III, tit. iii, chap. vi), together with the Gloss on the word *repugnet* which notes from the text of the law that a person otherwise eligible[2] might through custom become ineligible. Thus also the Gloss (on *Authentica*, XLVIII, collection v, tit. 3, chap. i, no. 1, word *auctore* [on *Novels*, XLVII, chap. i, no. 1]) states that by that law the custom can establish what is to be the essential form of the contract, so that its non-observance invalidates the contract. This opinion is followed by other writers, who are mentioned by Felinus (referred to above) and also by Rochus (*De Consuetudine*, Chap. xi, sect. 1, no. 10). Other passages are cited by Antonio Gabrieli ([*Communes Conclusiones*,] Bk. VI, tit. *De Consuetudine*, Concl. 3, especially to no. 4 [no. 8]).

Felinus. Rochus. Antonio Gabrieli.

The proof from reason for this assertion is that a custom which is reasonable and prescriptive has all those other effects which human law can have. Therefore, it has this effect also; since no probable reason can be brought forward why custom should not be able to have this effect when it can have the others. For just as the will of the prince verbally expressed can produce this effect, so also can his will tacitly expressed through custom, as is clear from the reason given in

[1] [A diriment matrimonial impediment in the canon law is one which makes an attempted marriage wholly void.—Tr.]

[2] [For *aliquam* read *aliquem*.—Reviser.]

the *Digest* (I. iii. 32). In like manner, we can apply here all the laws that speak in a general way of the force of custom and compare it with written law; as does the law referred to above (*Decretals*, Bk. I, tit. IV, chap. xi) in an especially clear manner, as Sánchez rightly proves in the passage cited above. For a fuller discussion of the details of this point, Sánchez's work may be consulted. There remains, then, no difficulty of any weight which demands our attention here.

Sánchez.

6. Furthermore, custom is assimilated to law in its effect in respect of the persons whom it can bind by its rule: for just as a law is binding upon those subject to it, so also is custom; and just as a law is not in force outside the territory for which it was enacted, so neither is custom [binding except on those for whom it was introduced]. Whence, if a custom is a universal one of the whole Church, it binds all Christians without distinction; if a custom is that of a single realm or diocese, all dwelling there are bound by it; if it is that of a city, all the citizens, and they alone, are held to its observance: the same is true in due measure of other communities. For it is a general rule that a custom of one community is not binding upon another distinct from it, for the reason that one community has not the power to give law to another, nor does the sovereign give consent thereto.

In what way a custom is to be assimilated to law.

So true is this, that even a custom of the city or of the diocese of Rome, regarded as Roman, that is, the custom of a particular diocese, is not binding upon other churches, because, as such, the Roman diocese does not act as their superior, except when the Pope commands that the [Roman] custom in question be elsewhere observed. This is also evident from usage, and is noted by Panormitanus (on *Decretals*, Bk. II, tit. IX, chap. v, at the end), and by Torquemada (on *Decretum*, Pt. I, dist. XI, can. iii), and by Rochus (*De Consuetudine*, Sect. 4, no. 18), who cites other examples.

Panormitanus. Torquemada. Rochus.

7. An objection can, however, be advanced against our thesis from the words of *Decretals*, Bk. IV, tit. XI, chap. iii, in which a certain bishop is ordered, 'to make inquiry about a custom of his metropolitan church, and of other churches in his neighbourhood, and diligently to imitate the same.' It might be concluded from these words that a custom of one diocese is binding in another, and especially that the custom of the metropolitan church is binding in suffragan sees. The reason given in the law is that it is a serious matter to contemn an ancient custom of the churches of a locality.

An objection.

My reply is that this law involves two questions. One is, whether the custom of the metropolitan church must be observed in suffragan churches. On this question it is certain, in the first place, that if a contrary custom is in force in a certain diocese, then that custom is to prevail, as all agree, since it

Solution.

prevails also over the common law, as we shall point out in the following Chapter.

The other is that if a particular diocese follows no custom of its own, then the evident conclusion from the above-cited law is that the custom of the metropolitan see should be observed in that diocese. And this conclusion can be based upon another principle, one accepted by many canonists, namely, that a custom of a city is binding upon
837 subject towns that lie within its territories, if those towns have no customs of their own. This is the opinion of Bartolus (on *Code*, VIII. lii. 2, in *Repetit.* 2, qu. 36, no. 41), of Antonio de Butrio (*De Consuetudine*, Chap. xi)[1] and of Rochus (*ibid.*, Sect. 4, no. 17), who cites the authority of numerous other writers.

Bartolus. Antonio de Butrio.

8.[2] But this may perhaps be the rule, in the case where a city can bind by its own municipal statutes neighbouring towns which are under its immediate jurisdiction. However, there is no parity between the relation of such a city and town and that of a metropolitan and suffragan church, for a relation of such subordination and immediate jurisdiction does not prevail between the latter.

Whence, just as the statutes enacted by the archbishop for his own diocese are not binding in the sees of his suffragans, so neither does the custom [of the metropolitan see] bind those of the suffragan bishops. It is my opinion, therefore, that the law is to be held as applying to a custom that has been in observance throughout a province, but is not known in a particular diocese of it, for the reason, possibly, that no case has come up to bring to light a practice either in conformity with or contrary to that custom. For it is in such a case, the Pope says, that it is necessary to consult the bishops of the neighbouring dioceses, and especially the metropolitan, and to follow their custom—when, that is, they observe the custom as a general one of the whole province, and not as one that is followed as peculiar to their respective dioceses.

Just as the special statutes of an archbishop do not bind the suffragan bishops, so neither do the customs of the archiepiscopal see.

9. From these observations are to be drawn the answers to the questions treated at length by Bartolus (on *Code*, VIII. lii. 2, *in Repetit.*, last qu.) and Rochus (*De Consuetudine*, Sects. 8 and 9), concerning the persons who fall under the obligation of custom: whether, for instance, it binds a prince or a sovereign senate; or, whether the custom of the city or of the territory binds strangers; or, whether a custom of a state is binding upon its citizens outside its territory. But in these and similar questions, the same rule prevails as holds good in the case of written laws and statutes, on account of the fundamental reason adduced, namely, that the custom with which

Bartolus. Rochus.

What persons are bound by a custom.

[1] [For *de Const.* read *de Consuetudine*.—Tr.]
[2] [In the Latin text there is an error in the numbering of the sections for the rest of this Chapter.—Tr.]

we are dealing is true law, emanating from the same authority and jurisdiction, differing from law only in its form, which does not change the binding character of custom in any of these cases. So all the principles which we have laid down with respect to human law on all these points are to be held as applying to custom also. The reader who wishes to inquire into these matters in greater detail may consult the authorities referred to above, and Gregory López ([on *Las Siete Partidas*,] Pt. I, tit. i, law 16, gloss 1 [*glossa* b]), Antonio Gabrieli ([*Communes Conclusiones*,] tr. *De Consuetudine*, Bk. VI, concls. 1 and 2), and others to whom those writers refer. I, also, have dealt with this matter in my work *De Religione* (Tom. I, tract. II, bk. II, chaps. xiii and xiv).[1]

Gregory López. Gloss. Antonio Gabrieli.

10. I shall mention, only briefly, a certain question discussed by every writer on this subject, namely, whether a custom of the laity is binding upon clerics. I shall not rehearse the various opinions of the writers on this point. The opinion commonly held by the canonists is that a custom followed solely among the laity is not binding upon clerics. The reason is that the two form distinct bodies and the clerical is the more eminent community. Again, the clergy are entirely exempt from the authority of laymen.

A custom of laymen does not bind clerics.

In the case, however, of a mixed custom, one observed both by clerics and laymen, it will be binding upon the clergy, since they have themselves given consent to the custom: they are bound, therefore, not by a lay custom, but by one of their own. This doctrine Rochus sets forth at some length (*De Consuetudine*, Chap. xi, sect. 8, nos. 54 and 65), where he proposes various extensions and limitations of this principle, and introduces many examples of it. Felinus touches upon this matter in two passages (on *Decretals*, Bk. I, tit. II, chap. x, nos. 100 *et seq.*, and Bk. II, tit. xix, chap. xii, no. 3), and Abbas [, i.e. Panormitanus] (on *Decretals*, *ibid.*, no. 3 [no. 1]) and Alberico de Rosate (tr. *De Statutis*, Pt. II, qu. ix) have also treated of it.

A mixed custom is one that is binding both upon the clergy and upon the laity.

Rochus.

Felinus.

11. It must be noted, however, that since custom chiefly emanates as law not from the people who observe it, but from the prince who gives his consent to it, it is more important to inquire by what power it has been confirmed and stabilized in its legal character, than to inquire into the position of the persons observing it. For the will of the prince or the prelate is the essential cause, that of the people is a motivating cause: the means of effecting and the petition for the consuetudinary law. The answer to the question whether a custom is binding upon clerics, will, therefore, depend very much upon whether it has been confirmed by a prelate of the Church, or by a secular prince. From which authority the custom came into being, can best be determined by a scrutiny

We must observe whose will it is that introduces custom.

[1] [Not included in these *Selections*.—Tr.]

of the subject-matter and purpose of the custom, as we have said before. The subject-matter, therefore, of the custom must be examined to determine whether it is spiritual or temporal, and whether it promotes the salvation of souls and the worship of God, or the ends of secular government. The answer to our present question will, I think, be drawn more successfully from a consideration of the authority from which the custom emanates, of its subject-matter, and of its purpose, than from any inquiry as to the persons who make use of the custom; although this latter consideration may be of some assistance also.

12. I conclude, then, that if the subject-matter is civil or political, and if it derives its force from the consent of a temporal prince, it is not, strictly speaking, binding upon the clergy; unless, that is, its character is such as not to be opposed to the liberties of the Church, and it relates to the common association of the citizens as such. Under those circumstances, the same opinion is to be adopted on the obligation of the custom as that which we said in an earlier passage would hold of a written civil law. For this assertion is based upon the principles set forth in that earlier passage[1] in which we discussed [the status of the clergy in] civil law: such a custom is, in a word, a civil one, and establishes civil law. The first part of this assertion needs no proof, since a lay prince cannot bind clerics through the exercise of his express will: he cannot, therefore, do so by his tacit will. Again, the clerics themselves cannot give a consent in opposition to their own immunity; and a prelate of the Church is not considered to give such consent. The truth of the second part of this assertion is evident from our earlier discussion of the written law: for the reasoning that is valid on that point is applicable to a custom by which clerics are affected not as clerics, but only as citizens. Such a custom is to be regarded in the same way as a written law would be.

First conclusion.

838

But if the subject-matter of the custom is of a mixed character, that is, if it pertains to both the civil and the ecclesiastical politics, and if the custom is observed in common by the members of each status or body, then there will prevail two customs (so to speak) and in reality two laws: one civil, having its force from the consent of the lay prince; the other ecclesiastical, having its force from the consent of the prelate of the Church; and each will be binding upon its own subjects, and one can be revoked independently of the other.

Finally, if the subject-matter of the custom is spiritual, and tends to the welfare of souls, as fasting, &c., it will be really a single custom, and will be binding upon both clerics and laymen, since it depends wholly upon the authority and consent of the prelate of the Church. In this case, the subjects of the

When a custom is binding upon clerics.

[1] [*Vide* Chap. xxxiv of Bk. III, *De Legibus*, not included in these *Selections*.—Tr.]

custom are considered not as clerics or laymen, but as Christians, without respect to status.

13. It may, again, be asked whether by a similar spiritual custom (so to speak), a usage of the laity only can establish a custom which is also binding upon the clergy. For, according to a rule of the above-cited jurists, the answer must be in the negative; and among the theologians, de la Palu ([on the *Sentences*,] Bk. IV, dist. xv, qu. 4, art. 3) repeats this denial. They base it first upon the ground that clerics follow their own rule of life, as, for example, their own practices with regard to abstinence; and again, upon the ground that clerics have a status similar (as it were) to senators, who are not bound by decrees of the commonalty unless they assent to such decrees; and finally, upon the ground that the monks are not bound by the customs of the secular clergy—notwithstanding that the customs of the latter are holy and religious—and as monks are to the secular clergy, so are the secular clerics to the laymen.

de la Palu.

But these reasons are not convincing to me, because the law resulting from a custom of this kind is episcopal law, since it derives its force from the tacit consent of a prelate, and its subject-matter is, of its nature, common both to the clergy and to the laity. Thus, in public fasts, and in the keeping of feasts, the secular clergy do not follow any special legal observances. This fact destroys the force of the first argument given above. The second also lacks force, because no analogy can properly be drawn between such a custom and a decree of the commonalty, for the latter emanates from the people, through their own tribunals, but the law of such custom as we are discussing proceeds from a prelate who is the common superior of both clerics and laymen. The third reason also is not valid, because the secular clergy are not exempt from the jurisdiction of the bishops, as are the religious orders. And with respect to such orders, the question [of their obligation] may be raised, a question which, as it is derived from their exemption, presents the same difficulty in the case of custom, as it does in the case of synodal decrees, which we have already treated.

14. Therefore, I conclude that the obligation arising from a custom of this sort can be extended to the clergy, and that in fact it is so extended, if it is the bishop's will, either tacit or explicit, to establish it as an episcopal law for his diocese. This, without doubt, is within the power of the bishop; and he is to be presumed to have done so when the subject-matter of the custom is, of its nature, common to all, and so equally useful and easy for all concerned that it would be impossible to impose the obligation upon part of the community, and not upon the whole of it, without creating scandal. This is especially true when this obligation is imposed at the request of the entire body of the laity, who, in relation to this custom,

Second conclusion.

are considered, as I have said, not as laymen, but as Christians; and accordingly, they can outnumber the clergy, and, with the bishop's consent, they can bring in a custom that is binding on the clergy, as well as on themselves.

Sometimes, however, a custom may be more properly that of the laity [than of the clergy], either because of the means by which it has been introduced—as, for example, by a special vow made by them, or because of the character of the subject-matter, which is fitted more for them than for the clergy—and in that case the custom will easily be obligatory on them without being such for the clergy, and can also, as such, receive the approval of superiors. And this is to be discerned from the usage itself and from the circumstances.

15. Another question which is treated by the aforesaid jurists relates to the effect of custom; namely, whether this obligation of custom is capable of extension from one case to another, on account of the similarity of the reasons involved. The jurists declare almost generally that an extension of this sort is to be allowed, although later they multiply various explanations and limitations, as may be seen in Rochus Curtius (*De Consuetudine*, Sect. 4, near the beginning), and in Burgos de Paz (Law 1, *Tauri.*, no. 51). Nevertheless, this extension is, in my 839 opinion, of rare occurrence. In the first place, a wider extension is not possible with a legal custom than with a law, since the force of a legal custom with respect to the obligation it establishes is not greater than that of written law—the peculiarities of both kinds of law having been taken into account—as is clear from the previous discussion. I may add, further, that an extension is more difficult of accomplishment in the case of a custom than in that of a written law. This is so because, in the first place, a law is extended for the most part by broadening the effect of its language, according to the meaning and usage which its words have in legal application generally in relation to such and such subject-matter. Whence, since words are lacking to a custom, this mode of extension can have no place, and therefore consuetudinary law cannot be extended in this fashion as written law can be. In the second place, I have, in previous Chapters, observed that this kind of extension is rarely to be admitted, even in the case of written law, unless there is very solid legal ground for so doing. I can only add the further note that in the case of custom it is much more difficult, and for that reason it is of rarest occurrence. For a legal obligation deriving its force from custom alone can be determined only with the greatest difficulty in respect of the locality, of the people concerned, or of the particular subject-matter with which it deals; in what way, then, is it to be easily extended to new localities, persons, subject-matters, except where these are so similar to the old

Of the extension of custom from one case to another, similar one.

Rochus.

Burgos de Paz.

as to be practically identical, or when the extension is made by law; or unless it is reasonably judged that the new is *a fortiori* included in the old, or, as it were, the part is included in the whole? Thus, in the *Code* (VIII. lii (liii). 1), it is stated that 'the governor of a province, having attested by inquiries those practices which have been commonly followed in the city in the same kind of legal controversies, is, having heard the case, to decide . . . &c.' For I consider that that phrase 'in the same' (*in eodem*) signifies 'in identical', and accordingly, I assert that there should be so great a similarity [in the second case to the first,] as to make the two practically identical. Other observations on this point, can be seen in Chapter Two of the preceding Book.[1]

CHAPTER XVII

CAN CUSTOM INTERPRET LAW?

1. This interpretation is the second principal effect which the laws grant to custom. It is, however, an effect of that custom which is in accordance with law; for custom which is outside law does not assume the existence of a law to be interpreted; and custom which is opposed to law, rather derogates therefrom. Hence only a custom which is in accordance with law can interpret it.

The reason for this effect is as follows: for the interpretation of a law already in existence, no authority of greater force or clearer expression of intention is requisite, than that which is needed for the introduction of a new law. All the reasons given in the preceding Chapter apply, therefore, with still greater force to this present effect. The laws are clear on this point (*Decretals*, Bk. I, tit. IV, chap. viii; *Digest*, I. iii. 23, 37).

First mode in which custom can interpret law.

2. In order, however, that this assertion may be amplified and be confirmed with reasons, I observe that a custom can avail for the interpretation of law in two ways; in one way, as a sign or witness thereof, since, so used, a custom in regard to the observance of law testifies that the custom expresses the mind of the lawmaker, and that it has been received as such, and in no other way, since laws are composed of customary usage, according to Isidore as cited in the *Decretum* (Pt. I, dist. I, chap. i). Isidore.

In this character, however, a custom cannot furnish a certain and infallible interpretation, since interpretation by custom is no more than human conjecture; but it affords a high probability, and so it is of much assistance in theoretical interpretation; and the more widely spread the custom is and the longer it has endured, the more probable will be the conjecture it furnishes. However, no certain criterion can

[1] [Not included in these *Selections*.—Tr.]

be fixed for assisting judgment in these matters; decision must be left to the discretion of a prudent mind.

We may add, however, that not only the custom which is concerned with the observance of a law itself after its enactment, but also that which existed prior to its enactment, may be of great assistance in understanding the meaning of that law. Hence, what is stated in the above-cited law (*Digest*, I. iii. 37), namely: 'If there is a question concerning the interpretation of a written law, the first point to be examined is what general rule of law the city formerly applied in cases of this character', can be properly understood as having reference not only to a custom which is subsequent to the law in question, but also to one preceding it. Since, as Isidore holds, and this is cited in *Decretum*, Pt. I, dist. IV, chap. ii, law ought to be framed in harmony with the custom of the country, we can, by referring to the ancient customs of a city, arrive at a probable conjecture as to the sense of the law at the time of its enactment. It is, then, in this sense that the Doctors frequently speak when they say that a law is to be interpreted according to the custom of the locality, even though such interpretation should necessitate some forcing of the strict meaning of the words of the law, because the law must be adapted to the customs of the men [who are bound by it]. This doctrine is stated at length in the Gloss (on *Decretals*, Bk. I, tit. III, chap. xxviii), by Bartolus (on *Digest*, I. i. 9), and also by Panormitanus (on *Decretals*, Bk. III, tit. XXVIII, chap. ix, no. 2).

3. Custom can interpret law in another way—as a cause both of
840 the introduction and settling of such interpretation, and also of the binding force of the law as thus interpreted. The Doctors, cited above, frequently lay down this doctrine, as do others also, to whom Mascardi refers (*De Probationibus*, Vol. II, concl. 1045 in its entirety), and whom he follows. The same is clearly set forth in the *Digest*, I. iii. 38: 'In ambiguities which develop out of existing laws, custom or the attestation of matters which have always been adjudicated in a similar way shall have the force of law.' Hence, just as we have said in an earlier passage that an interpretation made by a law is an authentic one by reason of the efficacy of such law in establishing that interpretation, so the same [in like circumstances] is to be said of custom which has developed to the point at which it obtains the force of law. This is, then, the true reason for that assertion, namely, that since a custom is effective in securing the establishment of law, it can also, for that reason, interpret a law efficaciously, and can do so in the way in which other laws do. Whatever, then, is necessary that a custom may have legal force, is equally necessary that it may interpret law in this way. What we have said above concerning these matters is, therefore, sufficient. Mascardi.

4. At this point, I shall merely note that the Gloss (on *Digest*, I. iii. 38, word *perpetuo*), concludes from the word *perpetua* in the law,

that a period of ten years must elapse, in order that a custom may possess the efficacy of which we have been speaking. The attentive reader will, however, note that the law just cited contains two members. One is 'custom'; the other is 'decisions of judges': and the word *perpetuo* is not attached to the first member—the word 'custom' is used without qualification; but the word *perpetuo* is attached to the second member, in order to make it clear that not simply any decisions will have this force, but only such as have always been concordant. For this reason, no note as to time is set down in the law for the first member; by the general rules [of interpretation] we are to understand the law as referring to custom validated by legal prescription. The word *perpetuo* attached to the second phrase does not signify a number of years, but a perpetual agreement in decisions; that is, that there has been in the decisions handed down on that matter no mutual variation or contradiction; this is the plain meaning of these words in common usage.

An observation of the Gloss.

What number of such decisions is enough, is not stated in the law, but it can be gathered from what has been said on this point in earlier passages. In principle, the decisions have this efficacy to the extent that they are able to establish custom. So that, if there has been but one, or a smaller number than is sufficient to establish a legitimate custom, then they might establish a probable argument [in favour of the interpretation], but one lacking legal force. Hence, I have often said that a judicial interpretation (so to speak) is reducible to a customary one, that is, to custom. For the decisions handed down by the courts are most of all effectual in that they are received and approved by the common consent of the people. This has been noted by Bartolus and other writers in passages which are frequently cited.

5. In the light of these considerations, we must understand the opinion of many writers, expounded as follows: custom is of such moment in the interpretation of law, that, even though it may not be clear from the words or the subject-matter of a law, whether or not the law contains a precept binding under pain of mortal sin, and should therefore, *per se*, be given the more favourable interpretation; nevertheless, if it is clear that a custom [growing out of the observance of the law] has been received as binding under grave obligation, the law is to be held as binding under pain of mortal sin. This is the opinion of Sylvester (word *praeceptum*, no. 2, at end), and that held by Cajetan (on II.-II, qu. 186, art. 9, ad 2, and qu. 147, art. 3, ad 2) in a passage treating in particular of the precept of fasting. Navarrus lays down the same doctrine in [*Enchiridion*,] Chap. xxi, no. 11.

The force of custom in the interpretation of law.

Sylvester. Cajetan. Navarrus.

On the same principle, a custom can interpret the word *praecipiendi* (commanding), a term under which a law is enacted, as signifying a serious obligation. Sylvester and Cajetan, in the passages just cited, call attention to this doctrine from the *Constitutions* of Clement (Bk. V, tit. xi, chap. i, § *Item ordo*). The Gloss on that passage makes the same observation.

Clement. Gloss.

The reason is that the lawmaker is presumed to employ words according to their common usage. Consequently, I hold conversely that, even though the words and subject-matter of the precept may seem to be such as to make it binding under pain of mortal sin, yet if the custom has interpreted the law otherwise, then it is binding only under pain of venial sin—as Cajetan also has observed. The underlying principle is the same in both these cases. For just as custom is able to introduce law, so it is also able to derogate from law, and this the more so, since the words and the matter of the law can scarcely be [always] so clear as not to leave some ambiguity and room for interpretation. This interpretation, therefore, custom can establish in both ways, namely, in a rigorous or in a gentle sense; but in order to do this efficaciously, it must, as has been said, possess the conditions necessary for the introduction or abrogation of law.

6. I add also that it is possible for a custom to interpret not only human law, but divine and natural law as well, as all the Doctors cited above teach. Nevertheless, with these latter kinds of law, the interpretation is effected in a different manner, since custom can interpret human law by restricting or enlarging its scope—as is clear from our remarks in the previous Chapter, and as will be clear from those which
841 will follow in the succeeding Chapters. Custom interprets divine law, however, only by indicating the intention of the lawgiver; and so, for this interpretation to be certain, the custom must be one that is observed as a tradition of the Universal Church, or one that has had the approval of the Popes.

Custom can interpret not only human law, but also divine and natural law.

Finally, it may be added that a custom can interpret not only written law, but itself also, as is clear from what has been said. The custom can do so because it also manifests the intention of those making use of it, although the custom itself is also to be interpreted by reason, as Rochus notes (*De Consuetudine*, Sect. 4, no. 23) from Baldus (on *Code*, VI. xxviii. 4, at the beginning); and this is evident in the nature of things.

Custom can also be self-interpreting.

Rochus. Baldus.

CHAPTER XVIII

CAN CUSTOM ABROGATE HUMAN LAW?

1. The reason for doubting that custom can abrogate civil law is based upon the rule laid down by the *Digest* (XLVII. xii. 3, § 5); namely,

that a municipal statute which has been enacted subsequent to a civil law, and contrary thereto, does not derogate from it. From this it is concluded that the same must be said of a custom, because the two are judged by identical standards.

On the abrogation of law through custom.

Again, an argument of the same tenor might be drawn from the *Code* (VIII. lii (liii). 2), where it is explicitly stated that, although the authority of custom is great, yet it is not such as 'to overcome either reason or law'. It is clear that the jurist must necessarily be speaking here of human law, for natural law is referred to in the first member of the phrase, wherein it is said that custom does not prevail over reason. The same doctrine is also found in the *Decretum* (Pt. I, dist. xi, can. iv), where there are many similar decrees. It is in accord also with that set forth in the *Decretals* (Bk. II, tit. xxvii, chap. viii), which states that, 'although the authority of usage or custom is of no small moment, yet it is never prejudicial to the truth or to law.'

The third and principal reason for doubting the power of custom to abrogate law is that a custom can have no force unless it is reasonable, as is stated in the *Decretals* (Bk. I, tit. iv, chap. xi), and as we have demonstrated above. But a custom, in opposition to law, cannot be reasonable: both because, by the very fact that it is contrary to law, it is against reason; and again because the actions done in pursuance of that custom deviate from right order and cannot work to the favour of those who offend, nor liberate them from the yoke of the law. For these reasons, Hostiensis (on *Decretals*, Bk. I, tit. xxxiv, chap. i [, rubric iv, no. 11])[1] held that a true preceptive law cannot be abrogated by desuetude. But in holding this opinion he stands alone; and he himself departs from it at times.

Hostiensis.

2. Notwithstanding the above arguments, the rule is certain that human law, whether canonical or civil, can be abrogated by custom. On this point, all the Doctors are agreed: the theologians, including St. Thomas (I.–II, qu. 97, art. 3); the canonists in their notes on (*De Consuetudine*, Chap. xi)—among them Hostiensis (in *Summa* on that same Chapter); the jurists (on *Digest*, I. iii. 32, and on *Code*, VIII. lii. 1 and 2); and the summists (word *consuetudo*).

Human law, whether canonical or civil, can be abrogated by custom.

St. Thomas.

Hostiensis.

With regard to the point [whether canon law can be abrogated by custom the rule] is expressly stated in the *Decretals* (Bk. I, tit. iv, chap. xi). Together with the other general principles there set forth, it is laid down that an ancient custom is to be observed, which rule I cited in a preceding Chapter. The same is expressed in the case of civil law in the *Digest* (I. iii. 32, at the end): 'it is most correctly

[1] [The reference to the Rubric *De Treuga et Pace* should be to the Rubric *De Consuetudine* (*Decretals*, Bk. I, tit. iv).—Reviser.]

admitted that not only by the decision of the lawmaker, but by the tacit consent of all, laws may be abrogated through desuetude.' The same principle is embodied in the law of our kingdom (in *Las Siete Partidas*, Pt. I, tit. ii, laws 3 and 5).

The proof of our assertion drawn from reason is the same as that which we developed in proof of an assertion in a preceding Chapter, touching another effect of custom. It is this, that the people do not lack the power to effect the abrogation of law, if the power is explained as it ought to be, and if their will is sufficiently made known by means of the custom itself; hence, nothing is lacking to custom for bringing about this effect.

3. And first of all, as to the power of the people to effect such abrogation, no difficulty arises with respect to the civil laws of democratic peoples who recognize no superior. This is clear from the principles demonstrated in Chapter xvi; for they apply in our present question also.

A difficulty arises, however, with respect to the civil laws of sovereign princes, and to the canon laws. This difficulty may be met in two ways. First, by saying that these laws are enacted not unconditionally, but with the tacit proviso that the people wish to retain them in force. Such a condition may be understood as present in these laws, either because the prince lacks the power to coerce his people beyond this point by means of his own laws—as some writers hold, at least concerning those legislators who are the source of civil laws; or for the reason that out of his benignity the sovereign has not the will to bind his subjects save under such a limitation—as some believe to be the case even with the canon laws. Consequently, according to this view, we must say that a renewed tacit consent of the prince is not necessary for this sort of abrogation, but that it is provided for in the very framing of the law. But we have already (Book III, chap. xviii, Book IV, chap. xvi)[1] rejected this solution, for the reason that, as a matter of fact, the power
842 to bind their subjects unconditionally is not lacking even to temporal princes; nor is the will to do so, even lacking to the prelates of the Church.

Two solutions to the difficulty.

What we demonstrated in the passages just referred to, both from reason and from usage, as to the acceptance of law, is even more certainly true with respect to the abrogation of law already accepted and confirmed by usage: otherwise it would always rest with the will of the people to rid itself without blame of the law of its superior: for such power will rest with the people if the [tacit] condition [of which these writers speak] is included in the law. If this were so, even a subject community could expressly and designedly revoke a law of its prince or prelate, which is absurd.

[1] [Not included in these *Selections*.—Tr.]

Hence, we must regard it as certain that this power must be explained as resulting from a union of the people with their prince and lawmaker. The reason is that this power to put aside a law, as it exists in the people taken alone, is rather a factual than a legal one; on the part of the prince, however, it is also a power to tolerate and give consent to the popular will. Thus, the authority to abolish law is complete in the combination of these two powers: because, in the last resort, its annulment is brought about by the same power that brought it into being—and that this can be done, I have shown in the previous Book.[1]

What power must reside in the people in order that custom may be introduced.

4. It is, therefore, evident that the principle laid down above has a most important application in respect of this result: namely, that it is not necessary [for these effects] that there exist in the people, viewed separately, the *active* power of making or of repealing law; but that it is sufficient that they have a capacity for receiving law, and that custom be introduced by those to whom the law applies. The reason is that this act of repudiating a law by custom is not one of jurisdiction, or of public authority, but is rather one that proceeds from those under a duty of obedience to the law. Accordingly, these acts [of repudiating law] are (as it were) contrary to the acts of making law, and, therefore, both are concerned about the same thing. And thus, a lay community has the power to establish a custom abrogating an ecclesiastical law. Indeed, even a community of women can have this power as regards a law addressed to them alone, as in the case of the law in *Sext*, Bk. III, tit. xvi, only chapter which—as authorities in this matter point out—enjoins the enclosure of nuns. The reason here is that such a custom does not, on the part of the subjects, abolish the law actively (as it were); it does so only to the extent that it demands from the superior that he abolish the law. That power is, as I have said, in the possession of the superior. It remains for us to take up next a discussion of such questions as touch upon the operations of the will [of the people and of the prince] in this matter.

A twofold will is required for the establishment of the custom [abrogating law].

5. For the introduction of a custom abrogating law, a twofold will is needed, the one of the people, the other of the prince. The first offers but little difficulty; for a custom is evidence of the general will [of the people]. It is clear from the above discussion that this custom should be public, and introduced or accepted by a majority of the people. This character of custom is, then, sufficient evidence of voluntary agreement, as is clear from what we have said in another place.[2] Indeed, with respect to the kind of custom we are here discussing, the reasons there given take on an additional force; for the will here

[1] [Not included in these *Selections*.—Tr.]

[2] [Cf. Chap. xii, § 1, *supra*, p. 545—Tr.]

indicated to abrogate a law is not a will to bind oneself or to take on a burden, but rather to set one aside. In this kind of custom, no intention to establish a new consuetudinary law is required; there is called for only an intention not to have or retain the law in question, and to resume the earlier status of freedom from legal obligation in this matter. Such an intention is sufficiently manifest by the frequency of the acts, and the agreement and constancy of the people in actions to that end.

A difficulty.

6. The only difficulty that is likely to be urged here relates to the canon laws made for the whole Church: for it will be necessary that a custom sufficient to derogate from a law of this sort be introduced and accepted by a major part of the Church; such an expectation, however, it is not easy to entertain, and such an agreement of the Church could hardly be manifested.

The reply.

My reply is, that if a general law for the whole Church is to be abrogated, nothing less than a custom, universal in the sense we have defined, will suffice; since otherwise it will not carry with it the general agreement of the Church, as such. This mode of abrogation is, therefore, very rare. Yet it is not impossible, since a knowledge of the custom can be effected within the space of forty years, through adequate report and public communication, by means of letters and through notification. Still we must add that, according to the usual practice of the Church and the canonical institutes, it is not to be expected that this abrogation will be accomplished at one and the same time for the entire Church, and by a universal custom; rather, it might be effected by the customs of the different portions thereof, in provinces, dioceses, and other communities which can be governed by their own laws. For if a custom in opposition to a general law prevails among a majority of some one of these communities, then there is a derogation from that law, which is valid for that community, even if the general law remain intact for the rest of the Church. Thus the whole difficulty disappears. This doctrine can be applied in due proportion to other common laws, both civil and canonical. This is the teaching of the Gloss (on *Institutes*, I. ii, § 9, word *imitantur*).

For this effect, a privative custom is sufficient.

7. And therefore, it is not always necessary for this effect [of abrogation] that there be a true custom of fact, that is, a positive custom, one which results from a frequency of actions. A privative custom—which is called
843 desuetude—is sufficient, one, that is, which arises from a repeated omission of an act, and which, of itself, is sufficient against affirmative precepts; for the reason that the very repetition of an omission to act sufficiently indicates a will not to accept such a precept. But it is necessary that the omission be a true [, i.e. formal] one, that is, one in opposition to a legal obligation; it must, also, occur at the time for

which the precept commanded the action, since the omission of an action when no action was obligatory is no indication of a will to disregard a law, or refuse to accept it, as is self-evident. This is the doctrine of Panormitanus (on *Decretals*, Bk. III, tit. III, chap. vii [, no. 9]), of Sylvester (word *consuetudine*, Qu. 8) and of Rochus (*De Consuetudine*, Chap. xi, sect. 4, nos. 76 *et seq.*), who deals with this point at great length, as well as of Navarrus (*Consilia*, Bk. II [Bk. I], *De Consuetudine*). We shall discuss this more fully later, in Book VIII,[1] in connexion with the loss of a privilege through non-usage.

Panormitanus. Sylvester. Rochus.

Navarrus.

8. From the above, a further conclusion is drawn, namely, that such omissions to act must necessarily be sinful, at least at the beginning; since if the omissions are based on some reasonable excuse—for instance, upon the warrant of some special necessity—they cannot give evidence of a will in opposition to the law. In such a case we shall have not desuetude, but a mere non-usage, which, by universal agreement, is insufficient. The same would be true if the element of ignorance of the law were to intervene, or the element of great fear, and for the same reason. Although, indeed, the fear be not great enough to excuse from fault, it may be sufficient nevertheless to prevent creation of a true custom or a desuetude. An act of this kind is not so much an act of the free will as one done under compulsion, and hence it cannot be sufficient indication of a purpose in opposition to law, nor of an absolute will to set the law aside, but only whilst such fear is imminent. And so it would seem to be a sufficiently probable view that in such a case the law is not completely abrogated, but rather that there is, at most, a derogation therefrom: namely, that it is to cease to be of obligation in the presence of so grave an inconvenience and a like imminent danger.

For desuetude, the first omissions are necessarily illicit.

This point is to be especially noted, for a custom of non-observance of a law can often be brought in upon the occasion of such a contingency or necessity, which, of itself, would not be sufficient for excusing from the obligation of the law; but by reason of this custom, assuming the fulfilment of the other requisite conditions, it can be established that the law shall not be binding upon similar occasions, and yet no absolute derogation from the law takes place. Examples of the situation described above are easily supplied in the observance of feasts and of fasts, and similar matters.

9. We take up now the question of the will of the prince, a matter to which the doctrine of the preceding Chapter is to be completely applied. In this matter also, the consent of the prince can be understood either as granted through the law itself, or, as personal, and (as it were) given afresh, though tacitly. Either mode is a valid one.

A twofold will of the prince is required.

[1] [Not included in these *Selections*.—Tr.]

The aforesaid Chap. xi of *Decretals*, Bk. I, tit. IV, has reference to consent of the first sort. The custom must fulfil two conditions to verify consent of that kind, namely, that it be reasonable and prescriptive; these same conditions are set down in the aforesaid laws [3 and 5 of Pt. I, tit. II of *Las Siete Partidas*]. Since no others are postulated, these are sufficient; in the absence of either the law established by the custom would be imperfect and incomplete. Some explanation of these two conditions is necessary to make their nature clear.

We have discussed at length the first condition in Chapters Six and Seven of this Book, where we explained what is called an unreasonable custom. At this point, however, two other observations must be specially added: one, that a reason of less force is needed in the custom for producing this effect [, i.e. the abrogation of law], than is required for introducing a law. The reason is that the abolition of a law is a matter of lesser moment than the creation of one. For in the annulment of a law no special utility or rectitude in the subject-matter itself is called for; it is enough that the annulment of the obligation in question be not contrary to the public advantage, since, although some advantage is taken away, there is a corresponding compensation, either in the removal of an occasion of a greater evil, or in conciliating the minds of subjects to a milder government.

Two notes.

First note.

10. Whence I add another observation on this point; namely, that it is necessary that in some way or other the custom, or rather the abrogation of law in consequence of custom, should be supported by a reason of some sort. Accordingly, the express repeal of a just law cannot be effected without some upright cause, as has been proved in the preceding book;[1] neither, therefore, can a tacit repeal, such as is made by custom, be effected without a cause of the same character. In like manner, therefore, for the custom to be reasonable, it is insufficient that it be not opposed to natural reason, or to divine law, or that it has not been reprobated by law; but it is necessary that the will to be without such law be justifiable on the part of the subjects for a good reason, such as also justifies the consent of the prince to the abrogation of the law. This is the ground and the necessity of this condition: for unless the custom is in some way reasonable, the prince is not presumed to yield to the desire of his subjects, for he cannot be presumed to have a will to abolish the law without just cause and adequate reason, since he cannot do this without fault, nor should he actually do so. Further remarks on this condition would seem to be unnecessary, though we shall have something more to say on this point when we come to answer the second difficulty that is brought against our assertion.

Second note.

[1] [Not included in these *Selections*.—Tr.]

11. The second condition, namely, that this custom be prescrip- 844
tive, has also been explained in former chapters. We shall, therefore, at this point, touch only on the question of the time required for this prescription.

Second condition.

We assume that it is not necessary for it to be immemorial, as some writers have asserted without a basis in truth, as I have observed in the preceding Chapter. Hence it must be certain that a period of a definite length is called for. Yet we must note a difference between the canon and the civil laws with respect to this matter—one that is taught by all the writers cited above.

For in the case of civil laws, the same time is required for the abrogation of law as for its introduction, namely, ten years. The reason is that the civil law makes no distinction on this point, but requires for both, without distinction, a long time, as is clear from the aforesaid law 32 [*Digest*, I. iii. 32].

A distinction to be noted between canonical and civil laws.

But a long time is defined in that law as ten years, as we have noted above. The same definition is more expressly laid down in the *Institutes* (II. vi, § 1 [II. vi, Pref.]). Nor does the law here make any distinction as to the length of the observance necessary by reason of the absence or presence [of the prince]—whatever Sylvester and others may hold—and this, for the reason set forth above. Now it is essential to this prescription that the ignorance of the custom on the part of the prince is supposed; since, if the prince has knowledge of the custom, the prescription is not necessary for this effect of which we are speaking, as I shall immediately prove. But with respect to a prince who is ignorant of the custom, any consideration of his absence or presence is irrelevant; and hence, the law requires the same length of time in both cases without distinction.

In civil law a custom of ten years' standing suffices for the establishment or abrogation of law.

Sylvester.

The authorities on law generally fix the length of time for this custom at ten rather than twenty years, although this term is not defined in the laws; and the ignorance of the prince may be regarded as a kind of absence—for the reasons we have rehearsed in an earlier passage.[1] Another reason is that in law of this kind the favour of the prince enters as an element, and this is extended when a shorter period for the validation of the custom is fixed. Again, the burden placed upon the people where the revocation of the law is put off for a long time is an element to be taken into account also; and this burden is lessened by fixing a shorter period. Thus, on either ground, our opinion is in harmony with the law and with the rule of law which says, 'in obscure matters, the course which imposes the least burden is to be followed.'

12. With respect to the laws of the Church on this point, there is

[1] [Cf. Chap. xv, §§ 5 *et seq.*, *supra*, pp. 568 *et seq.*—Tr.]

a diversity of opinion. For some authorities hold that the same ten-year period is sufficient for these, as in the civil laws. In support of this opinion are quoted Azo (in *Summa*, tit. *De Consuetudine*), Calderinus and others (on *Decretals*, Bk. I, tit. xxxiv, chap. i). These writers are, however, speaking of a law not yet accepted, a point with which I have dealt in Books Three[1] and Four.[2] Though, indeed, there is probably no difference in the prescriptions in either case, since either custom would be counter to the canon law.

Concerning laws of the Church, there is a diversity of opinion.

Now the true opinion and the general one is that a period of forty years is required for a custom to be held prescriptive against canon laws.

That a space of forty years is required for a custom to be prescriptive against canon law.

This is the view of Innocent, on *Decretals*, Bk. I, tit. iv, chap. viii; of Panormitanus (*De Consuetudine*, Chap. xi, no. 11, and on *Decretals*, Bk. I, tit. xxxiv, chap. i, no. 4); of Felinus also (on *Decretals*, *ibid.*, no. 13); and of Rochus (*De Consuetudine*, Sect. 3, no. 35). It is that set forth by Torquemada (on *Decretum*, Pt. I, dist. i, can. v, qu. 2, and Pt. I, dist. i, can. iv, qu. 4); by Bartolus on *Digest*, I. iii. 32, (in *Repetit.* qu. 2, at the beginning, subquestion 3, no. 14), where in the scholia others are cited; by Jason (on *Digest*, I. iii. 32, col. 11, no. 43); by Antoninus ([*Summa*,] Pt. I, tit. xvi, § 4); by Sylvester (word *consuetudo*, qu. 4); by Angelus de Clavasio ([*Summa*, word *consuetudo*,] no. 8), and by other summists there cited. It is that also defended by Navarrus (*Consilia*, Bk. II, *De Consuetudine*), Corduba ([*Quaestiones*,] Bk. I, qu. xii, ad 4), and Gregory López (on *Las Siete Partidas*, Pt. I, tit. ii, law 5, gloss 4 [*glossa* g]).

Innocent. Panormitanus. Felinus. Rochus. Torquemada. Bartolus. Jason. Antoninus. Sylvester. Angelus de Clavasio. Navarrus. Corduba. Gregory Lopez

The proof of this opinion is usually derived from the aforesaid *Decretals*, Bk. I, tit. iv, chap. xi, since it demands [, for abrogation,] a custom validated by a prescription in accordance with law; and in canon law only a custom of forty years' standing is termed such. This is the view of Rochus (*De Consuetudine*, Sect. 3, no. 4), drawn from the Gloss, together with the text of *Sext*, Bk. III, tit. iv, chap. v.

But I do not think that this proof is satisfactory, because the phrase 'validated by a prescription in accordance with law', is a general qualification, and means no more than that the custom must endure for the time and under the conditions prescribed by the law. These words could, then, according as the matter to which they referred varied, indicate equally a prescription of ten or of forty years. Hence, a custom 'validated by prescription in accordance with law', may also be demanded for the introduction of a law outside of, but not opposed to, the common law, in a case where the prince is ignorant of the custom. Because of the unsatisfactory nature of this phrase, the aforesaid

[1] [Only Chapters i–iv and xxxii–xxxiii of Book III are included in these *Selections*.—Tr.]
[2] [Not included in these *Selections*.—Tr.]

writers add that for a legitimate prescription against the Church, a custom of forty years is necessary, according to the *Decretals* (Bk. II, tit. XXVI, chaps. iv and vi), together with other chapters that deal with prescriptions. But a custom opposed to the canons can rightly be said to be against the Church, since it is against the laws of the Church: therefore, a legitimate prescription in such a matter ought to be one of forty years' running.

13. Some writers even add that not only is a period of this length necessary when the custom is contrary to the canon law, but also when it is contrary to the reason of a canon, as is noted by the Gloss (on *Sext*, Bk. I, tit. XVI, chap. v, word *statuimus*) and also by Geminiano on the same Chapter; and he is followed by Peter of Ravenna (Tract. *De Consuetudine*, Sect. I, no. 20). The same view is held by Felinus (on *Decretals*, Bk. II, tit. XXIV, chap. xi, no. 3, and Bk. I, tit. XXXIII, chap. xv, no. 3), where he explains that this assertion is to be understood as referring to a custom contrary to the reason expressed in the law. I add, however, the further note that the reason here referred to must be one so intrinsic and essential to the law that when it ceases to exist the law also must be held as ceasing to exist. This assertion, in the sense of Felinus's qualification of it, is, in that case, a well-grounded one; for a custom opposed to the reason of a law is virtually opposed to the law itself, and therefore derogates from it. But if the reason of the law is not such as I have noted, but one which can cease to be whilst the law still continues in force, I do not see why a custom opposed to the reason alone of the law should be held to be contrary to the law itself, or why so long a time should be required [for its effect].

Gloss. Geminiano. Peter Ravenna. Felinus.

Finally, these authors add that because of the character of its subject-matter, a custom may have to be an immemorial one, as when a custom is contrary to the special laws of the prince, and even so a period of forty years will be necessary for the establishment of a custom which is outside the canons, if it should derogate from the law of some particular church.

But even though these observations may be true, they are not properly applicable to the legal custom of which we are speaking, except in so far as a custom of that sort may be bound up with a prescription properly so called on some matter which would require a longer duration.

14. Hence, also, we conclude that a custom fulfilling these two conditions, if it is opposed to an existing law, abrogates that law, even if the custom does not come to the knowledge of the prince. This is the teaching of nearly all the Doctors cited above, and of Covarruvias (on *Decretals*, Bk. IV, *De Matrimoniis*, Pt. II, chap. vi, § 10, nos. 18 and 19 [nos. 35 and 36]), of Dominicus de Sancto

An abrogation of law is sometimes effected by custom even when the prince is ignorant of the same.

Geminiano (on *Decretum*, Pt. I, dist. IV, in § *Leges*, after can. iii, with Gloss), of Archidiaconus (on *Decretum*, *ibid.*), and others. Felinus in his observations on this point cites these writers. Reference may be made also to all of those whom I have cited in a preceding Chapter.

15. For the same principle applies here. Assuming the existence of a law giving this efficacy to a reasonable and prescriptive custom, there is present by reason thereof a sufficient consent of the prince—by his tacit legal will, so to speak—to the abrogation of the law opposed by the custom. For the operation of such a will, no new knowledge [of the custom], such as is necessary for an expression of his personal will, is required; nor can we add this condition contrary to what the said law lays down. The reason is that for juridical effects no more conditions are to be required than the laws demand; and here the law sets forth these two conditions as sufficient for this effect; and each condition can be fulfilled without the knowledge of the prince.

The truth of this assertion with respect to the first condition [, i.e. reasonableness,] is self-evident: for a custom is not reasonable merely because it is known to the prince: since any other kind of custom can be equally known or not known by him; and a custom must be postulated of such a reasonable character that it can truly be known as such.

Concerning the second also, the truth of our assertion is clear; for a prescription does not require in the person against whom the prescriptive right is acquired any advertence to the prescription. Furthermore, the nature of human law in a certain way demands this; for it should be adapted to human conduct. Therefore, it is highly expedient that when a people has persevered for a sufficiently long time with a stubborn purpose in a course of conduct opposed to a law, the prince should not urge the law, but should rather cease from enforcing it. Hence, it is justly provided that a prescriptive custom repeals a law [in opposition thereto], irrespective of the knowledge or ignorance of the prince. This matter offers no further difficulty.

16. On the other hand, the question may be raised as to whether a non-prescriptive custom can at times effect the repeal of a law, at least in cases where the prince has knowledge of the custom. For Panormitanus (*De Consuetudine*, Chap. xi, no. 13) is very clearly of the opinion[1] that the fact that the prince has knowledge of the custom is not sufficient to effect a derogation from the law within a shorter time than that required for a prescription. Support for his thesis may be found, first, in the doctrine of the same last chapter of the Title *De Consuetudine* [*Decretals*, Bk. I, tit. IV, chap. xi], which unconditionally demands the fulfilment of the two conditions we have mentioned, in

What is the force of non-prescriptive custom [with respect to the abrogation of law]?

Panormitanus.

[1] [The author refutes these arguments of Panormitanus in later paragraphs. *Vide* pp. 600 *et seq.*, *infra*.—Tr.]

order that a custom may have this effect; therefore, a custom in which one or the other of these conditions is lacking cannot produce this effect, even if the prince have knowledge of the custom. A confirmation of this argument is that if the custom is not reasonable, the fact that the prince knows of it in no way enables such custom to repeal the law, according to the most common opinion: therefore, if the custom is non-prescriptive, it will be insufficient, even though it has been brought to the prince's attention. The logical nexus of this argument is evident, because these two conditions are demanded as of equal necessity. A second confirmatory argument offered by Panormitanus is that the most that can be inferred from the fact of the prince's knowledge is that he tolerates the custom, but this, according to the *Decretals* (Bk. III, tit. v, chap. xviii), does not establish consent. It is for this reason that the said author adds that then only should the prince be held to abolish the law when he not only has knowledge of the custom, but follows it himself; for by so doing he gives (as it were) his express consent to it. Finally, I add this further argument: this custom is valid as a kind of prescription; but the time necessary for a prescription is not shortened because of the knowledge of the prescription on the part of the person against whom it is being established. Therefore, . . .

17. Nevertheless, I hold that the contrary[1] is true. I assert, then, that a non-prescriptive custom is at times sufficient to derogate from a law, provided the prince has knowledge of the custom, and provided the custom itself is of such a nature, and of such duration as practically 846 to be an indication of his consent to its effect. This seems to be the teaching of St. Thomas (I.-II, qu. 97, art. 3, ad 3) where he demands not a prescription of the custom for this effect, but a sufficient expression of consent by the prince. Soto holds the same opinion (*De Iustitia*, Bk. I, qu. vii, art. 2), as do Bartholomew Medina (on I.-II, qu. 97, art. 3) and Gerson (in the aforesaid treatise *De Vita Spirituali*).

A non-prescriptive custom is sufficient at times for the abrogation of a law.

St. Thomas.

Soto.

B. Medina.

Gerson.

This would also seem to have been the view of Antonio de Butrio (*De Consuetudine*, Chap. xi), for he says that if the Pope has knowledge of a custom in opposition to a law, a period of ten years is sufficient. This statement is approved by Sylvester (word *consuetudo*, Qu. 4), and by Angelus de Clavasio (*Summa*, word *consuetudo*, no. 8). The same is held by the canonists generally with respect to cases where a custom opposes a canon law which has not yet been accepted, as Felinus records at length [on *Decretals*, Bk. II, tit. xxiv, chap. xi, no. 3 and Bk. I, tit. xxxiii, chap. xv, no. 3].

Antonio de Butrio.

Sylvester.

Angelus de Clavasio.

Felinus.

The same reasoning holds, as I have already pointed out, for a custom [resisting a law of this status, as holds for a custom contrary to a law that has been accepted by those to whom it applies]: and this,

[1] [Contrary to the position just urged by Panormitanus.—Tr.]

both for the reason that such a custom is like the other in that it is in opposition to the Church and her law; and again, because, as I explained above, the observance of a law for a certain period does not increase its legal effect, as such, but is said to confirm it only in fact. Therefore, in respect of their force as law, the principle is the same in both of these cases.

Another proof is that there is no ground for holding that the reason validating the establishment of law should be greater than what is necessary for the abrogation of law. But a non-prescriptive custom of which the prince has knowledge suffices for the introduction of law—as we have demonstrated earlier. Therefore, such a custom is sufficient for the abrogation of law.

The proof of the major premiss and of the logical nexus of this argumentation rests upon the fact that the whole basis of either of these effects lies in the tacit will of the prince; and this will, specific and personal (as it were), can be known not less clearly from a non-prescriptive custom contrary to law, but known to and tolerated by the prince, than from a custom that is outside the law. Therefore, the former custom is no less sufficient for derogation of law than is the latter for the introduction of law. Indeed, there is even more reason for presuming the consent of the prince for the accomplishment of this effect than for the introduction of new law; and this, both for the reason that such abrogation is urgently needed in order to remove from his subjects an occasion of offending against the law which still prevails, and also, because the custom itself brings about such a change in the subjects themselves that through it they have become in a certain fashion unfitted for the observance of the law in question, for the observance of the law ought to be easy and adapted to their general conduct.

Finally, this opinion is confirmed by usage, since many of the laws of the Church are held to have suffered derogation within periods shorter [than forty years], for the reason that the Popes, though not ignorant of the usages, did not manifest their wishes [in favour of the law].

18. On the question of the time required for this effect when the prince has no knowledge of the custom, I think that the opinion that fixes ten years as necessary—although it is defended by Antonio de Butrio and other authorities—is advanced without good reason. For this assertion of Antonio de Butrio cannot have application to the civil laws, because in the case of such laws, even when the prince has no knowledge of the custom, a period longer than ten years is not, as we have said, required for this effect; our assertion, on the other hand, holds true even of civil law, for the reason that when the prince has

Of the time required for the abrogation of a law through a custom when the prince is ignorant of the same.

such knowledge of the custom, the full prescriptive period of ten years fixed by the civil law is not required. And if the words of these writers are to be taken as referring to the canon laws only, they should fix the length of time which should be demanded for this effect [with due proportion] for civil laws. But they cannot, on any good grounds, assign any fixed period as required for such civil laws; hence, neither can the term necessary for this effect in the case of canon laws be fixed, on sound reason, at ten years.

Moreover, there is this general argument [against their position]: the period of duration for this kind of custom has not been determined by any law; therefore, any fixed definition of its necessary duration is unfounded.

A more complete explanation of this point is found in the very fact that since a prescriptive custom is not demanded here, the effect of the custom is dependent not upon the dispositions of a law but upon the prince's consent as judged from the natural [, to be distinguished from the legal] significance of his actions. But with respect to the duration of observance necessary here, judgment finds no guidance in the dispositions of the law or in the nature of things, since the term of observance of such a custom will vary according to circumstances, as I have explained above.

The time here required must be left to the judgment of a prudent mind.

Therefore, it is useless to speak of the period as one of ten years. The same assertion holds true of this point, as was made in a like passage on the introduction of a law: the matter must be left to the judgment of a prudent mind. This is the view of Soto, B. Medina, and others.

Soto. B. Medina.

19. In fact, some canonists have inferred from this conclusion, that when an entire city, or community acts in opposition to some statute made by that community, one act in opposition to the statute will be sufficient to revoke it. The reason is that by this one act the will of the maker of the statute to repeal that statute is sufficiently manifested, since the will that acts against the statute is the same [as that which brought it into being]. This is not the case with law enacted by the will of the prince.

Panormitanus. Giovanni d'Andrea.

This is the doctrine of Panormitanus (on *Decretals*, Bk. III, tit. IV, chap. XV, no. 9), and of Giovanni d'Andrea (on *Decretals*, Bk. III, tit. V, chap. XXII, and Bk. I, tit. II, chap. VIII). The same doctrine is taught by other writers on these laws. But we shall discuss this point, as well as the meaning of the words of these texts, in our discussion on privileges; for under that head the texts are dealt with. Respecting statutes, properly so called, I do not think that sign [of a single act contrary to the statute] is sufficient evidence [of the will of the community to revoke it], unless it is obvious from other circumstances that the community did not perform the action by way of a

temporary dispensation from that statute, but rather[1] as an abrogation thereof. It is to be added that a custom [and not merely a single act] is essential also, as I have said, for the abrogation of statutes that require for their validity the confirmation of the prince.

847 20. My reply to the argument[2] based upon the *Decretals* (Bk. I, tit. IV, chap. XI) is that the custom there referred to is one which can, even without the sovereign's knowledge, effect the abrogation of a law; that is, a custom which has that power by reason of its special character and the force and virtue it possesses through the law. But the passage [*Decretals, ibid.*] does not exclude that custom which only serves as a sign [of the general will] and an indication of the will of the sovereign to abrogate a law. For in this sense, not only a custom, but any act of the prince which sufficiently manifests his will, can abrogate law, as is clear from the aforesaid law 32 [*Digest*, I. iii. 32]. It is evident in reason, also; because that power resides in the will of the prince, and differences in the manner of its outward expression are purely incidental.

Explanation of *Decretals*, Bk. I, tit. IV, chap. XI.

In answer to the first[3] confirmation we deny, at the outset, the equivalence of the examples given: for the condition that a custom be reasonable is necessary from the very nature of the case; but the condition demanding a prescription comes from the law alone, and hence the former condition is the more essential, and holds in every case, since the will of the prince should at all times be and should be presumed to be reasonable, both when it is given expression in a particular case, and when it is manifested in a general way by the disposition of law.

Again, it is maintained that if the will of the prince is sufficiently manifest, even if the custom has no rational basis, so long as it is not contrary to reason, and contains nothing evil, the abrogation would be valid; even though it may have been illicitly made. This doctrine has been set forth in an earlier passage with respect to an express abrogation, but the same is true if we assume that the abrogation is tacit. But such will in the prince is most rarely or never to be admitted when the custom is so much lacking in reason that it would be illicit to yield thereto, and to abrogate the law on account of it, even when it is well known to the prince, since an evil will is not to be presumed in the prince. The contrary, however, would be true if from the very obduracy—even from an unreasonable obduracy—of the people towards the custom, there is given to the prince a moral cause and reason to judge the revocation of the custom would be prudent. For then, even

[1] [Read, *sed illud abrogando*.—Reviser.] [2] [Cf. Sect. 16 of this Chapter, *supra*, p. 599.—Tr.]
[3] [This refers to the confirmation of the argument of Panormitanus, stated in Sect. 16, *supra*, p. 600.—Tr.]

if the prince knows that the people's custom is an unreasonable one, his connivance at the abrogation [of the law] in tacitly tolerating the custom is to be presumed, since under these circumstances the abrogation is just.

Whence to the second confirmatory argument,[1] my reply has already been made in an earlier passage: namely, that in itself the sovereign's toleration is not enough to indicate his consent, but that when other circumstances are present there can then exist a prudent and correct indication of his consent, and that in the present case, there would be an excellent sign of the will of the prince [to abrogate the law], when, though the prince is conscious of the popular resistance to it, he connives at this resistance: for his doing so whilst the law is in force would be unreasonable and harmful to the people, and hence his permitting the custom to be observed—unless the contrary were made clear—would be presumed to spring from an intention to abrogate the law. The same principle applies as often as the situation is such that abrogation of the law must be deemed the prudent course: in such a situation the knowledge and toleration of the custom by the prince is properly taken as consent.

In reply to the last confirmatory argument,[1] we deny the assumption: for it has already been shown that, in the case mentioned, the custom exerts its effect not as a form of prescription, but as evidence of the consent [of the prince] drawn from his knowledge and tolerance of the custom.

21. My reply to the first difficulty, found at the opening of the Chapter, which has been taken from Section 5 [*Digest*, XLVII. xii. 3, § 5], is that the words of that law have many interpretations, which we cannot here discuss. Many, however, understand the passage to refer to a situation in which the statute or custom has existed first, and the law is enacted subsequently, and thus it has reference not to our present matter, but to the question to be treated in Chapter XX.

The answer to the first difficulty.

Others construe it to refer to a situation in which a general law exists first, and is followed by a municipal statute. This seems closer to its literal meaning, and it is also a denial of the opinion that the statute remains valid as against the law, which seems to be most probable. For, although Panormitanus, in discussing *De Consuetudine*, Chap. xi, makes the distinction between statutes of the laity and statutes of the clerics to reside in the fact that particular churches cannot enact statutes opposed to the canons, but that cities can enact laws contrary to general law, I do not see the basis for this distinction. Hence, *Digest*, I. i. 9, proves nothing on this point, and the contrary is demonstrated from the aforesaid Section 5 [*Digest*, XLVII. xii. 3, § 5].

Panormitanus.

[1] [In Sect. 16, *supra*, p. 600.—Tr.]

This is also clear from what was said *supra* in Book III [of this work][1] on the power to make civil laws. I therefore deny that the same reason applies to statute and to custom, as Panormitanus himself admits [*ibid.*] with regard to statutes and customs of clerics.

The reason here would seem to be—even though various reasons are given by the canonists, as by Panormitanus [*ibid.*], and more fully by Rochus (*De Consuetudine*, Sect. 3, no. 7)—that human laws ought to be adapted to the general conduct of the people for whom they are made, and that therefore lawmakers ought, in this matter, to respect a reasonable custom of their subjects. This reason and necessity cease to hold in the case of statutes of custom; for they have been made by inferior powers, which ought to be subordinated to those that are superior; and hence these statutes cannot, by the ordinary law, prevail
848 against the laws of superiors, except by special concession.

22.[2] In answer to the second difficulty, which is taken from the *Code* (VIII. lii (liii). 2), I note, first, that this law also has been variously explained, as is clear from the Gloss (on *Decretum*, Pt. I, dist. xi, can. iv). The most general and probable reply is that this law must be construed as referring to a custom not having the conditions laid down in the *Decretals* (Bk. I, tit. iv, chap. xi). This is the reading of it given by Jason (in addit. to Gloss, on *Institutes*, I. ii, § 9, word *imitantur*), where the Gloss advances a different explanation. The true meaning of the passage is that a custom is not of so great authority as to prevail in opposition to the will of the prince; and this meaning is indicated by the words of the same law, where it says: '[The authority of custom is not slight, but] it will not prevail by its own force [so as to overcome right reason or positive law]'; that is, by its own force and authority. This assertion is in perfect harmony with the fact that custom may be such as to show that the will of the prince has been changed and this, either by the evidence that it gives of such change, or by virtue of some law [in which the conditions, under which his consent is to be presumed, are laid down].

Answer to the second difficulty.

23. In reply to the third difficulty, St. Thomas says (I.-II, qu. 97, art. 3, ad 2), that a custom contrary to a law can be established by means of actions which are morally good, and that the custom will, therefore, be a reasonable one. His reason is that a human law can be disobeyed without fault when necessity arises in some particular cases. Whence, if such occasions are frequent, a custom is established through actions contrary to that law, which proves that the law is not advantageous to the community and, consequently, abrogates the law. This reply is

The answer to the third difficulty.

[1] [*Supra*, Bk. III, chaps. ii and iii, pp. 372 *et seq.*—Tr.]

[2] [This Section and the two following are incorrectly numbered in the Latin text.—Tr.]

Panormitanus. Archidiaconus.

also suggested by Panormitanus (on *Decretals*, Bk. I, tit. xxxiv, chap. i, no. 4); and his opinion follows that of Archidiaconus (on *Decretals*, *ibid.*).

But this reply does not meet the difficulty. The reason is that those actions are not permitted except by way of *epieikeia* because of a present urgent necessity. But such acts do not establish a custom contrary to law, since they are not contrary thereto, nor do they evince in the people a state of mind in opposition to the law, as has been explained above; nor, again, can an action done in virtue of a custom arising from such acts alone be regarded as licit; it will be such, only upon a similar occasion of need, in which case its justification is provided for by *epieikeia*. But if those occasions occur so frequently as to prove the law to be useless, the law is abrogated, not by reason of the custom, but because it has been proved to be burdensome and of no effect in itself; or else it will cease because the end for which it was enacted ceases to avail generally.[1] So St. Thomas himself says [I.-II, qu. 97, art. 3, ad 2] that: 'Such a custom shows that the law is no longer useful.'

St. Thomas.

Secondly, St. Thomas replies [*ibid.*] that the law is set aside through custom when the latter has been so firmly established that the law no longer seems possible to observe in accordance with the custom of the country. However, should the matter reach this point, there would be not a real abrogation of law, but rather a cessation of the law through a change in the subject-matter. So great a change, however, is not always necessary for the abrogation of a law. For a law is often abrogated if there is a concurrence of the circumstances described above, and this, even if the law might be otherwise justly binding, provided the sovereign's will has not tacitly intervened in one or other of the ways we have mentioned.

St. Thomas, therefore, in the solution he has given, apparently wishes only to indicate the ways in which the cessation of a law can take place through custom; and this, without relation to the consent of the prince, but from the nature of the case, as it were. But such a process is, however, not a true abrogation, but a cessation of law. But in the solution that he gives in the passage (I.-II, qu. 97, art. 3, ad 2) he is rather speaking of abrogation properly so called.

24. I shall, then, frame my reply to this objection from the principle laid down in Chapter IV of this Book, namely, that a custom may have its inception through actions which are bad because they are forbidden by law, and yet may establish a custom in derogation of law. This is admitted by Cajetan (on I.-II, qu. 97, art. 3, ad 2),

It is possible for a custom begun by actions which are bad, because forbidden to derogate from law.

Cajetan.

[1] [Generally: the teaching of canonists is that if the end or purpose of a law ceases to avail for the people generally, the law ceases; not so if it ceases to avail only in particular cases.—Reviser.]

as it is by all other writers. Indeed, it is clear from what we have said that in order to effect this sort of abrogation, the customary actions will inevitably be bad at the outset because they are in opposition to a law which is binding, and this, apart from any excuse or plea of ignorance. The reason why these acts are sufficient for abrogation is that, during the development of the custom, they concur not as a cause, but rather as an indication of the will of the prince or of the law; for they can be an evidence of his will even if they are bad. Again, the final result of such a custom is not evil, namely, that actions of the same sort may be done without fault after the abolition of the law; and it is to this that the prince consents when he abrogates the law. And so this custom, even though it is unreasonable in its mode [of introduction] and initiation, is not essentially such (since these acts can become licit) either in the issue effected or in the results that flow from it. The reasons are that the prince can, on the ground of such custom, prudently and reasonably abrogate the law; that when the custom has matured these acts are licit; and finally that the right to do these actions freely thereafter is a just one—for there arises, as it were, an absence of the law, or rather of the prohibition, which prohibition could be reasonably abolished.

It is added by Cajetan (*ibid.*) and Panormitanus (*ibid.*) that although at the beginning those who act against the law commit a fault, yet their successors can presume that the law has ceased to be observed for some reasonable cause. This certainly seems to be generally probable, especially when the abrogation takes place by means of a long-continued prescription. But I maintain that such a presumption as that is not necessary; for even though all the actions were bad, as being done counter to the law before the completion of the time necessary for prescription, or before there has been a sufficient presumption of a tacit will of the prince, nevertheless, when the prescriptive period has elapsed, or a sufficient manifestation of the prince's will made, the law (*lex*) would be abrogated by force of law (*ius*) in general, or the tacit will of the prince. This tacit will of the prince is just, though the acts of the subjects were bad, as has been stated. It is to be noted that such a custom is not, on the ground that it brings about this effect in this way, to be regarded as equivalent to a prescription—as I have shown in the First Chapter.

Cajetan. Panormitanus.

849

25. Some will urge, however, that the law [that was abolished] was reasonable (for this follows from the nature of law, and it is assumed that, in this case in question, the law is a true and valid one), and that hence the opposing custom will be unreasonable, and this not only because it has been introduced by acts that are bad, but because it tended to abolish a reasonable law. This would, then, seem to be a procedure contrary to reason; and since

An objection.

the two are direct contradictories, if one is reasonable, the other must be unreasonable.

The solution.

My reply is that the same argument was used previously against the express abrogation of a law, and it was then clear that such could be reasonable and just: hence the solution given there will serve for this objection also. Therefore, I maintain that the law [that is abrogated] is not reasonable in the sense that it is necessary, but only in the sense that it was adapted to bringing about certain effects: but notwithstanding these, the abolition of the law and the custom effecting that abolition may be reasonable under other aspects, which are also good and fitting. It is the usual case of two contrary probabilities: because one may have the advantage of a greater probability, the other is not therefore unreasonable: and this is especially so, because a comparison [between contrary probabilities] usually leaves the matter in doubt.

CHAPTER XIX

DOES THE ABROGATION OF A LAW THROUGH CUSTOM ADMIT OF ANY EXCEPTION OR EXTENSION?

1. For the better understanding of the rule laid down in the preceding Chapter, we must discuss some exceptions to it which are frequently advanced; and towards the end of the Chapter we shall see whether the rule admits of any extension.

First exception.

The first exception demanding attention has to do with penal laws by which the penalty is imposed by the fact of transgression. Thus, some writers have held that a law of this kind cannot be abrogated by a prescriptive custom, even when it is a reasonable one, since any action counter to such a law is condemned as soon as it is done and incurs the penalty of the law.

Giovanni d'Andrea. Panormitanus.

This opinion is noticed by Giovanni d'Andrea and Panormitanus (on *Decretals*, Bk. I, tit. xxxiv, chap. i). Yet this exception has no legal basis; it is contrary to reason, and therefore the above-cited authorities have rightly rejected it.

Exception rejected.

They do so because even a custom opposed to such a law can be reasonable, as is self-evident; and it may, further, serve as a sufficient indication of a tacit will of the legislator to abrogate that law. For this abrogation may be not less expedient for the common good in the case of a penal law than in that of any other legal rule whatever, when it is not adapted to the general conduct of the people, or when experience has shown that it is not profitable to them. Likewise, the words and reasoning of *Decretals*, Bk. I, tit. iv, chap. xi, apply as equally to this kind of law as to others.

Finally, a confirmation of our argument can be drawn from the

example of the law (*Extravagantes Communes*, Bk. V, tit. i, chap. i) which prohibits under censure any remuneration accepted for entrance into religious life; and yet through usage this prohibition has, according to a probable opinion, as we have elsewhere said, been wholly abrogated. This is also the view of Navarrus ([in *Enchiridion*,] Chap. xxvii, no. 106), who gives other examples of this sort. Navarrus.

The reasoning in support of the contrary opinion is of no weight; since, notwithstanding the legal condemnation of the action, and the fact that while the law persists, the penalty is incurred by the transgression, it has actually been possible to nullify the force of the law through usage, either by a prescriptive and reasonable custom, or by the tacit consent of the prince. And when the custom has been thus validated, the act is no longer condemned by the law or liable to penalty.

2. It is seriously doubted whether a custom can derogate from the penalty of a law, while leaving it still binding in conscience. Some writers, in discussing this point, distinguish between a law that imposes its penalty due to actual transgression, and one that merely provides that punishment must be inflicted; and they assert of this latter sort, that there may be a derogation from that part of the law which deals with the penalty. This opinion is certain and generally accepted. The reason here is one peculiar to this kind of law: the penal section of such a law instructs the judge, and is binding upon him; therefore, just as derogation from other laws is possible, so it is possible from this, in so far as it is a precept addressed to the judge.

A doubt and a distinction on the above exception that must be noted.

Alfonso de Castro (*De Potestate Legis Poenalis*, Bk. II, chap. xii), however, denies that this holds true of a law which directly inflicts a penalty or a censure *ipso facto*; and he cites the authority of Hostiensis (on *Decretals*, Bk. I, tit.[1] xxxiv [, no. 1][2] and Tiraqueau in support of his opinion. The latter, however, is speaking of another matter, as I shall prove shortly. Castro's reason may be that if such a law is not itself abrogated, a fault is always committed in violating it; and that, therefore, the penalty is always incurred. Thus, if excommunication is the penalty [attached to a breach of the law], of necessity it follows the violation of the law, since contumacy against the law precedes its violation.[3] The same is true of the other penal effects that are inflicted by the law itself; and hence there can never be a derogation from the law in respect of these effects alone; nor, therefore, can there ever be a derogation from it in respect of the penalty alone. A confirmatory proof [of Castro's assertion] might be drawn from the consideration that such

Castro. Hostiensis. Tiraqueau.

[1] [Read 'tit' for 'cap' in Latin text.—Tr.]

[2] [Hostiensis says nothing about this matter in his comment on *De Treuga et Pace* (*Decretals*, I. xxxiv).—Reviser.]

[3] [*Contumacia* in canon law is not really expressed by the word 'contumacy'. The Latin word means violation of law that is fully deliberate.—Reviser.]

a custom would be unreasonable, since its tendency would be to allow offences to go unpunished.

Panormitanus. Felinus. Navarrus.

A penal law, even when imposing a penalty *ipso facto*, may be abrogated through custom.

3. Nevertheless, we must assert the contrary opinion, in agreement with Panormitanus, Felinus, and commentators generally (on *Decretals*, Bk. I, tit. xxxiv, chap. i). It is that also of Navarrus (*De Regularibus*, Commentary III, no. 55 [consilium 55], and in *Enchiridion*, Chap. xxvii, no. 106).

The first proof of our assertion is inductive. In earlier times the sons of men of the clerical order were made serfs at birth by the law itself, as a punishment for the incontinence of the father (*Decretum*, Pt. II, causa xv, qu. viii, can. iii); but this penalty was abrogated by desuetude, while the same guilt continues to attach to the offence, as the Gloss on that canon notes. Likewise in *Extravagantes Communes* (Bk. III, tit. iv, only chapter) penalties are imposed for actual transgression, which have disappeared through non-usage, even though the law has continued in force, as may be seen in Navarrus (*Enchiridion*, Chap. xxvii, no. 150), where other examples of this kind of abrogation are to be found. We ourselves daily observe the revocation of the penalties of law without the revocation of the laws themselves—as was recently done by Clement VIII [on the *Constitution* of Pope Sixtus V],[1] concerning that regulating the mode of receiving novices into religious institutes. And since derogation can be effected through the laws, it can be effected through custom, as is clear from principles already laid down.

Gloss. Navarrus.

The reason finally is that derogation from a law is possible without the abrogation of the law. This is in accord with the words of the Gloss (on *Digest*, L. xvi. 102): 'For derogation occurs when a part [of the law] is removed; but abrogation, when the whole is annulled.' There can, then, be derogation from the law through custom, although there is no abrogation, as Navarrus rightly concludes (*Consilia*, Bk. I, *De Consuetudine*). The reason is that there is a parity between the force of law and that of custom. Therefore, when, for any reason, the various parts of the law are separable, derogation can be made from one portion, while the other is left unaffected. But the penalty of the law can be separated from the guilt incurred by its violation. Custom can, therefore, derogate from the law respecting the imposition of a penalty, and can leave the guilt incurred by its violation intact. The reason is that the penalty in question is not essentially annexed to the transgression, but proceeds from the will of the prince; and his will may be changed with respect to one part of his law, whilst unchanged with respect to

[1] [The *Constitution* of Pope Sixtus V, *Cum de Omnibus*, regulated the reception of novices into Religious Orders (1587). This *Constitution* was modified by Pope Clement VIII. in his *Constitution In Suprema* (1603). Cf. Bullarum RP. PP. collected. Rome, 1747. Tom. IX, p. 370. Tom. XI, p. 409.—Reviser.]

another, as is self-evident, and as is proved by usage. And the prince is bound by the law, as to its directive force, even though he is not bound as to its penalty. The Gloss (on *Decretum*, Pt. I, dist. iv, can. vi, word *consuetudine*) is to this effect also, when it states that even though custom can sometimes release [the sinner] from the temporal punishment due to his sin, it cannot release him from the punishment of hell.[1]

Refutation of the basis of the contrary argument.

4. I reply, then, to the argument of those who hold the opposite thesis, that so long as the custom has not been validated by prescription, or has not prevailed in opposition to the penalty, then it is true that the latter is incurred by a transgression of the law. Nevertheless, it can happen that even though the penalty is incurred, it is never upheld, and that such non-observance might continue during the running of the time required for prescription, or for the period needed to indicate the will of the prince, who knows of and tolerates the non-observance or non-execution of the penalty; and this is, in a way, sufficient for the abrogation of the penalty—even though no custom opposed to the observance of the law had been established.

In reply to the confirmatory proof [for the contrary assertion] given above,[2] it is to be said that the only effect of such a custom is that the punishment fixed by the law is not at once incurred; but not that the superiors lacked power so to punish offenders and ought not to do so: it does not, therefore, follow that the custom is unreasonable. It is the same case as that in which the penalty of the law is not one incurred by actual transgression, but is to be imposed by the judge, where, even though there has been a derogation from the existing law to the effect that the judge is not bound to impose the penalty fixed by that law, nevertheless, the new rule does not restrain him from imposing some other punishment, if he deems it expedient. Otherwise, the custom of which we are speaking would be an unreasonable one.

In what sense the aforesaid distinction is true.

5. Still, the above opinion, or distinction, applies in a certain sense to an unreasonable custom opposed to a law, a matter concerning which many jurists say that even though a custom of that kind cannot abrogate the law, it can, nevertheless, remit its penalty.

Gloss. Rochus.

This is the opinion expressed in three Glosses (on *Decretals*, Bk. I, tit. iv, chap. vii; on *ibid.*, Tit. xi, chap. ii, word *antiqua*, first reply; and on *ibid.*, Bk. II, tit. xxv, chap. i). It is also that given by Rochus (*De Consuetudine*, Chap. xi, no. 33, to no. 8 of Section 1),[3] where he treats this point at length.

[1] [Release from temporal penalty by custom must refer to a penalty inflicted by some human authority.—Reviser.]

[2] [At the end of Sect. 2 of this Chapter. *supra*, p. 609.—Tr.]

[3] [This reference will be clear if the reader consults *Tractatus Illustrium* (Venice, 1584), Vol. II, pp. 348 *et seq.*, in which this work of Rochus Curtius is contained.—Reviser.]

Therefore, I maintain that the distinction between a law which imposes a penalty for actual transgression and one which provides that the penalty may be imposed by a judge, is relevant and useful here.[1] For when a penalty is imposed by the law itself, no abrogation of the penalty nor any derogation therefrom is possible through an unreasonable custom alone; for the consent of the prince to remit the entire 851
punishment cannot be indicated by means of such a custom. Nor, again, can such a custom avail to diminish the penalty of a law, if it is unreasonable in respect of that part of the law—for the same reasoning applies here, as I shall make clear immediately. However, when the penalty is one that is to be imposed by a judge, the custom may afford him an excuse, at least, for the reduction of the penalty, for this is within his authority.

6. Nevertheless, it is to be noted, in connexion with this thesis, that an unreasonable custom of a community is one thing, but a private custom of offence by an individual is quite another.

Observations.

The first observation.

For the last-named custom cannot, of itself, have the effect of remitting the penalty, even in the forum of human law, but it rather increases it, because it aggravates the guilt, and is a form of violation which is especially detrimental to the common good. The above-cited authorities [, in setting up their thesis,] are thinking not of a private, but of a public custom.

With respect to the latter custom, two other considerations can be urged. The first is that it can be understood as exempting from the penalty, or as diminishing it, in two ways: in one, through the abrogation of the law or by some derogation therefrom, at least as to that part of it which deals with the penalty; in the second, by reason of the circumstances of the customary actions, that is, because of the number of those offending against the law and of the frequency with which the law is violated, there comes into being a proper reason for the reduction or remission of the penalty, even if no derogation is made from the law itself.

The second observation.

The second consideration to be urged is, that a custom opposed to a penal law can be unreasonable in two ways. First, by its transgression of the law as a whole; that is, both by the commission of a fault against the provisions of the law itself, and by the remission or non-execution of the penalty provided in the law. Secondly, the custom can be unreasonable in so far as it is a transgression of the law, but not in so far as it fails to carry out the punishment annexed to the law—as might be the case where, even though the malice of the transgression is admitted, the penalty is felt to be too

The third observation.

[1] [This is the well-known distinction between penalties *latae sententiae* and *ferendae sententiae*.—Revisers.]

harsh, or too little in accord with the people's ways, or is one that gives occasion to more serious transgressions for some other such reason.

7. I say, then, that a custom which is unreasonable in its disregard of the penal section of a law cannot establish a legal immunity from that penalty by the abrogation of the law.

What force an unreasonable custom may have [in the abrogation of a penal law].

The proof is that it is impossible for an unreasonable custom to abrogate a law (*Decretals*, Bk. I, tit. iv, chap. xi). No custom can, therefore, in any wise, in so far as it is unreasonable, derogate from a law in respect of any part of that law to which it is contrary; for what is true of such custom in relation to a law as a whole, is true of it with respect to parts of a law. Therefore a custom, unreasonable in its non-execution of a penalty, or in its failure to impose the penalty which is fixed by law, can never derogate from the law in question, even in respect of the law as it imposes a penalty. This assertion is applicable as much to a law which provides that the penalty is to be imposed by a judge (*poena ferenda*), as to one which imposes the penalty for actual transgression, as is clear from the proof given above.

I add, however, that even though a custom is unreasonable in so far as it involves a breach of the law, it can, if there is good ground for a disregard of the penalty, derogate from that portion of the law which deals with the penalty—and this, both in respect of the part of a law which imposes its penalty for actual transgression, and of one providing that the penalty be imposed by a judge.

A custom unreasonable as a whole, but which is grounded in reason in respect of the disregard of the penalty of the law, can derogate from the penal portion of the law.

We shall demonstrate our assertion by argument from contraries. Every custom, in so far as it is reasonable, can prevail against that part of the law against which the custom stands in opposition, according to the *Decretals* (*ibid.*). Therefore, a custom which is reasonable in disregarding the penalty of the law will be able to derogate from the portion thereof that fixes the penalty; and this, even though it does not remove completely the obligation of the law, since in the latter regard the custom is, in our assumption, unreasonable.

This inference is logically valid, both because the principle on which the argument rests is, with due proportion, applicable here, and because the useful portion of the law is not impaired by that part of it which is of no value when the two are separable. But in the case of the law we are considering, the penalty is separable from the transgression, as has been explained. Then, finally, the prince may justly give his consent to the remission of the penalty, even though the directive force of the law remains unimpaired; hence, he is to be presumed to do so when there exists a reasonable and prescriptive custom to that effect, or one that has been tolerated for a sufficient length of time.

In what way a custom which is unreasonable, in respect of both parts of the law, may afford some excuse for the non-observance of it.

8. I observe, finally, that even if the custom is wholly unreasonable as to both portions of the law, it may afford some excuse for the non-observance of it as a modifying circumstance—that is, when the law is not one in which the penalty is incurred by actual transgression, but one which provides that the penalty is to be imposed by a judge. And this, I think, is the sense in which the language of the jurists is to be interpreted. And this becomes clear, first, with respect to individual offenders, from the fact that from a public custom made up of actions in violation of law, especially from such a custom when it is tolerated, there results some ignorance of the law whereby the offence comes to be regarded as less serious; or, if not ignorance of the law, such an insensitiveness to the unlawfulness of the act as to lessen the gravity of the fault and, consequently, the liability to punishment.

Secondly, the example of the violation of the law by great numbers of people presents a very strong temptation (as it were) drawing the transgressor on as by an object of vehement passion; and this fact must usually be accounted as a mitigating circumstance in individual violations of the law. It is this kind of mitigation of the penalty that is discussed by the Gloss (on *Decretals*, Bk. I, tit. IV, chap. vii), as well as by Panormitanus in his comment on the same Chapter (no. 5), and is treated with some fullness by Rochus (*De Consuetudine*, Chap. xi, no. 33).

Panormitanus.

Rochus.

Again, with respect to the community in general, the multitude of offenders gives rise to the occasion for a failure in executing the penalty, for the reason that it is not easy to punish a whole multitude without scandal, or without causing great disorder and greater harm to the community. Neither is it expedient to punish some, but not others, since this also would give rise to scandal on the ground of favouritism. Even when punishment can, for a particular reason, be visited upon some persons, these are usually few in number, and immunity would then result to the community as a whole. 852

These two modes of release from the penalty of a law are suggested in the *Decretals* (Bk. I, tit. XI, chap. ii). The latter—in respect of the community as a whole—is set forth by Gregory I (in *Decretum*, Pt. I, dist. IV, can. vi) and is suggested by Augustine, in *Letters*, l [= clxxxv, chap. x, no. 45, Migne ed.], cited in *Decretum*, Pt. I, dist. I, can. xxv, more clearly in *Letters*, lxiv [= xxii, chap. i, no. 3, Migne ed.], cited in *Decretum*, Pt. I, dist. XLIV, chap. i. It does not, however, apply in the case of a law which imposes its penalty for actual transgression, for a law of that kind makes no distinction of circumstances, and in all cases rules to the same effect.

Gregory.

Augustine.

9. Finally, a doubt may be raised in this context as to whether it is

possible for a custom to cause a relaxation of the direct obligation of a penal law while leaving the obligation of the penalty intact, thus transforming (so to speak) a mixed law into one wholly penal in character. This point was touched upon by Tiraqueau, in commenting on L. *Si unquam*, word *revertatur*,[1] where, in the twenty-fourth note on the distinction between a *poena lata* and a *poena ferenda* (no. 350), he rehearses the distinction applied by a certain Matthieu in the Preface to the *Constitutions* of Clement [*Universitati*]. For when a law imposes its penalty automatically, Matthieu holds that even though the law itself falls into desuetude, the penalty for its violation is incurred. And in support of his opinion, he [i.e. Tiraqueau,] cites *Decretum* (Pt. I, dist. XI, can. viii, *Sext*, Bk. I, tit. II, chap. ii)[2] and *Decretals* (Bk. III, tit. XVIII) without specific explanation. But I find nothing either in the laws cited or in the whole title that has to do with this question. Matthieu holds, however, that when the law is one which provides that the penalty be imposed by a judge, if the law falls into desuetude, the penalty is also abrogated. In support of this distinction he cites a passage from *Decretum*, Pt. I, dist. IV, can. iii—which also proves nothing. Tiraqueau does not comment upon this opinion, but sends the reader to other writers whose names he gives.

A doubt.

Tiraqueau.

Matthieu.

10. I can see no truth whatever in this opinion. For the custom to which the thesis [of Matthieu] has reference must be either one that is inchoate and [therefore] insufficient for the abrogation of a law; or it must be one that is perfect and complete. The first kind of custom cannot, of itself, derogate from a law in respect of its primary obligation, as is evident from the principles that we have established in earlier Chapters, and from *Decretals*, Bk. I, tit. IV, chap. xi. Consequently, such a custom has no bearing on the present point, nor can it have any effect on the abrogation of the direct obligation of a law, nor can it do away with the obligation to pay the penalty of the law, whether that is imposed by the law for actual transgression, or is to be imposed by a judge. It cannot do so, because it has not the force to make actions done in violation of the law guiltless, nor is it of itself sufficient for the abrogation of the penalty of the law.

The above reason is rejected.

If, however, Matthieu is here speaking of a matured custom, we must ask another question, namely, whether the distinction he lays down in his assertion with respect to the effect of customs abrogating the direct obligation of the two kinds of penal law, is to be understood as being an actual and necessary, or only a possible one. It is neither: for—to test its necessity—it does not necessarily follow that when the abrogation of the direct obligation of the law has been achieved, a

[1] [The reference is to Tiraqueau's commentary on a law (*Si unquam*) issued by the Emperors Constantius and Constans to Orphitus (P. V.), and it is found in the *Code* of Justinian, VIII. lvi. 8, and also in the *Theodosian Code*, VIII. xiii. 3.—Reviser.]

[2] [There is, however, nothing in this law on desuetude: it refers to ignorance of penalties.—Reviser.]

penalty imposed by the law itself is incurred through an action done in observance of a custom opposed to the law. Indeed, the contrary is the more probable consequence; for, with the cessation of the guilt, the penalty then should also lapse—and this seems more frequently to be the actual result. Nor, on the other hand, is it a necessary consequence that when the direct obligation of the law has been abrogated, a penalty to be imposed by a judge should lapse; for the custom can be such that it releases the subject from obedience to the law under the pain of guilt, without, however, releasing him from the obligation to pay a penalty for its violation—as I shall prove immediately. The distinction in question is, therefore, one without foundation.

11. The difficulty, therefore, [set down at the beginning of Section 9,] can be raised with respect to both kinds of penal law without distinction, and this, on the ground we have just stated, namely, that when the adequate cause has ceased to exist, its effect ceases to exist: therefore, if the guilt due to the breach of the law is removed through custom, the penalty which follows that guilt is removed also, whether it be a penalty incurred or a penalty to be imposed; for, in the case of both, guilt is the adequate cause of the penalty. A custom established with any other intention would be unreasonable.

It is possible that derogation may occur from a law respecting the obligation of guilt, while the penalty remains unimpaired.

Nevertheless, I hold that it is possible for a custom to derogate from a law with respect to the obligation of incurring guilt, whilst the debt of the penalty remains in some cases, that is, where the penalty does not essentially presuppose the presence of guilt. This, I infer, is the position taken on this point by Navarrus (*Commentaria De Lege Poenali in Cap. Fraternitas, Decretum*, Pt. II, causa XII, qu. ii, chap. xi), as is shown by the tenor of his discourse as a whole and especially by that of the last number (consideration 3), which, even though it is imperfectly stated, gives sufficiently clear evidence for this reading.

Navarrus.

The proof for this thesis is that derogation from the law is possible, even though it is not abrogated; and there can, therefore, be derogation from any portion thereof which is separable from the other, while the latter remains in full force. But the imposition of a penalty, or a threat of the same, is independent of the obligation of incurring guilt, as is evident from our earlier discussion of the nature of a penal law. Therefore, a law of a mixed character can be derogated from, in respect of its direct and absolute obligation, in such wise that it remains one of a purely penal nature. Nor is such an effect in itself unjust, since, even though a penalty, taken in its strict meaning, has reference only to guilt; nevertheless, considering it in a broad sense as a burden, or a civil penalty, that is, derived from human sources, it is sufficient that it should be related to a [juridical] cause, and (so to speak) to a juridical

culpability. Nor is a custom causing such derogation unreasonable, because there may be good reason for mitigating the obligation.

12. Thus, it is possible that many civil laws—imposing fines, pro-
853 hibiting freedom of the hunt,[1] or the cutting of timber, or the carrying of certain articles out of the country—although in the beginning they may have been directive in nature, can later, through usage, have become merely penal, and thus have changed their character. The reason is that they were treated as such in practice and it was only in that way [, namely, by non-observance] that prescriptive customs were established against them.

I added in my assertion, the qualifying note, 'where the penalty does not essentially presuppose the presence of guilt', in order to exclude from this class of laws those to which censures are attached. For derogation is not possible from the obligation of laws which prohibit under pain of censure incurred by actual transgression, unless there is also a derogation from the censure. This is so because a censure intrinsically presupposes guilt and disobedience, but such presupposition is not implied in every penalty taken in a wide sense. Such laws, however, can be abrogated, either absolutely or merely in respect of the censure, as Navarrus holds in his comments on the *Extravagantes Communes* (Bk. III, tit. IV, only chapter) in the aforesaid *Enchiridion* (Chap. xxvii, no. 150).

For the argument in support of the opposite view is of no weight, since, even though the action stands condemned by reason of the law, and the penalty is immediately incurred by those who offended against the law in the beginning, nevertheless, both the obligation and the punishment, or one of them, can be abrogated by reason of a custom and the tacit consent of the prince.

13. A second [alleged] exception relates to invalidating[2] laws. For many hold that these cannot be abrogated by custom. This conclusion would seem to be supported by the *Decretals* (Bk. IV, tit. XIV, chap. v), inasmuch as it is there stated that custom cannot abrogate the law of the Church forbidding marriage between blood relations.[3] The same is signified in the *Decretals* (*ibid.*, tit. xi, chap. iii), respecting the custom[4] prohibiting marriages between persons who are spiritually related. No other reason, it would seem, can be assigned for that rule except that the law in question is an invalidating one. This seems to be the opinion of Covarruvias (on

The second exception.

Covarruvias.

[1] [Read *venari* for *veneri*.—Reviser.]

[2] [Invalidating laws render an act null and void from the beginning, as in the case of certain contracts; disqualifying laws render the person incapable of certain legal acts, as in the case of marriage.—Reviser.]

[3] [Such laws were really disqualifying.—Reviser.]

[4] [*Consuetudinem* also appears in the 1619 edition, and we must suppose that Suárez was referring to the impediment of spiritual relationship arising in the first instance from custom, just as marriage between Jew and Gentile was forbidden at first, by custom.—Reviser.]

Driedo. Sánchez.

Decretals, Bk. IV [*De Matrimoniis*], pt. II, chap. vi, § 10, no. 18),[1] and he cites [in no. 35] Driedo (*De Libertate Christiana*, Bk. X, chap. xi [Bk. I, chap. xi]) in support of it. Sánchez [*De Sancto Matrimonii Sacramento*] refers to many others who favour it also.

Council of Trent.

These writers, although they are apparently speaking specifically on the subject of matrimony, do, however, infer from that matter a general principle, namely, that a custom cannot qualify a person whom the law has disqualified; but every law invalidating a human action disqualifies persons for that action, or for entering upon the contract referred to, as was affirmed by the Council of Trent (Session XXIV, in the decree *De Matrimonio*), and as we have noted above in Book V.[2] Therefore, if a custom cannot qualify a person who is disqualified, so it will be unable to abrogate a law with this invalidating effect; for by abrogating such a law it would qualify the person. In confirmation of this proof, it may be said that an invalidating law renders a person incapable of performing the act with which the rule of the law is concerned; and a custom cannot cancel such an incapacity of a person.

Felinus. Decio. Aimone Cravetta.

This is the common opinion among jurists. It is also that of Felinus (on *Decretals*, Bk. II, tit. xxvi, chap. xi), of Decio (on *Decretals*, Bk. II, tit. i, chap. xiii, no. 12 [Bk. II, tit. ii, chap. xiii, no. 13]) and of Aimone Cravetta (*De Antiquitatibus Temporum*, Pt. IV, § 3). And a proof for this opinion might be drawn from experience, that is, from the general practice in regard to irregularities, censures, and other like canonical impediments, which cannot be removed by custom.

This exception also must not be admitted.

14. Nevertheless, neither is this exception, in my opinion, to be admitted, because the *Decretals* (Bk. I, tit. iv, chap. xi), sets forth a principle of general application when it says that a human law can be abrogated by a custom that fulfils the two conditions there stated. But such a law, even though it makes an action null and void, is still a human law. Therefore, if a custom, contrary to this law, fulfils these two conditions, it abrogates the law; if, however, it does not fulfil these conditions, it will effect no exception to that law. To say that there cannot be a reasonable custom counter to an invalidating law, is arbitrary. For such a law can be abrogated for a just reason and is often so abrogated, as is evident in the ancient law prohibiting marriage between persons related within the fifth degree, which has now been abolished.[3] A custom, therefore, contrary to an invalidating law of this kind can be reasonable on the same basis, and consequently can also be either prescriptive, if it endures for a long time, or it can indicate the tacit consent

[1] [Covarruvias, *Opera*, Antwerp, 1627, Tom. I, pt. II, chap. vii, par. 10, no. 35; reference to Driedo is Bk. I, chap. xi, at end.—Reviser.]

[2] [Not included in these *Selections*.—Tr.]

[3] [The Church mitigated her prohibition against marriages between blood relations. At present, the prohibition extends to the third collateral degree.—Reviser.]

of the prince, if he has knowledge of it. It can, therefore, abrogate a law.

A confirmatory argument can be drawn from the admitted principle that a custom can establish an invalidating law, as we have shown; therefore, it can abrogate such a law. The validity of the argument is clear from the fact that the principle is the same in both cases, as is admitted by Covarruvias (*ibid.*); for the consent of the prince is manifested by the custom for either effect, and in both it is possible for the subject-matter to be just and reasonable, as has been explained.

Covarruvias.

Gloss.

This opinion is set forth in the Gloss (on *Decretum*, Pt. I, dist. viii, can. vii, word *consuetudinem*), which states that an ineligible person may be made eligible by custom; that is, by the abrogation of the law through which he had been ineligible (*Decretum*, Pt. I, dist. xii, can. viii). The same view is held by Innocent (on *Decretals*, Bk. IV, tit. xi, chap. i, at end), where he is speaking on the subject of matrimony, and of the diriment impediments [thereto], which are those that are chiefly a matter of doubt. This opinion is followed also by Torquemada (on

Innocent. Torquemada. Hostiensis. Gabriel. Sánchez.

854 *Decretum*, Pt. I, dist. xxxii, can. xiii, art. 2, [ad 2, no. 10]), by Hostiensis (in Summa on *Decretals*, Bk. IV, tit. xi [rubric, xi, no. 6]), by Gabriel ([on the *Sentences*,] Bk. IV, dist. xlii, qu. i, art. 3, doubt 6 [sole qu., concl. 9, doubt 6]) and by Sánchez (*De Sancto Matrimonii Sacramento*, Bk. VII, disp. iv, no. 4 [nos. 6 *et seq.*]).

This also is clearly assumed by the Doctors in their assertion that it is possible for a custom to derogate from a law, which gives not only accidental, but also essential form and solemnity to an action, even in the case where that form and solemnity have been established by positive law. This is also the doctrine of Rochus on this point (*De Consuetudine*, Chap. xi, sect. 2, nos. 34 and 35), where he gives certain other examples on this matter.

The reply to the opposing arguments.

15. My reply to other arguments set forth for the opposite view is, in the first place, that the authorities who hold that the impediments which make marriage invalid cannot be annulled by custom, are not formally in opposition to us. For their arguments are based not upon the general principle that an invalidating law cannot be abrogated by custom, but upon the special condition of such a custom in the matter of matrimony, in which case their opinion is that this custom is, of itself, essentially evil and unreasonable, or, at least, that it has been condemned by the law. The validity of their view thus qualified should be discussed with relation to the subject matter of matrimony; but we shall have something to say in a general way on this point in connexion with the next alleged exception. It is, however, improbable that those writers who maintain the contrary view have thought that every custom opposed to an invalidating

law is unreasonable; and this, both because such custom is not always found condemned by law—as is evident—and, again, because it cannot be held with any probability to be so merely in the nature of the case, as I have shown.

16. We must add that a person legally disqualified may be held to become, through custom, again qualified, in either of two ways. First, through an abrogation of the legal rule by which his disability was brought about; and this, we repeat, can be effected through custom. For if that disqualification be a penalty, it can be removed; just as the penalties imposed directly and *ipso facto* by other penal laws can be abrogated, since the principle involved is the same. If, however, the disability is not a penalty, but is imposed because of something unbefitting, or for some other just cause, then we must determine whether this unbefitting factor or cause continues to exist, or has disappeared. For in the first situation, the custom would be unreasonable, and to that extent ineffective; but in the latter, it would be possible for the custom to derogate from law, and bring it about that such disability should no longer be contracted.

Two ways considered in which a person may become legally qualified, through custom.

A second view might be held on this point, namely, that a person lacking qualification or capacity can have his disability removed by prescription if he gains by the qualification he lacks, without derogation from a general law. But this mode would seem to be an impossible one. It has, however, no bearing upon the matter we are discussing, since we are concerned not with prescription, but with legal custom properly so called. The argument indeed confirms what we have said earlier about the impossibility of the derogation from a law by the private usage of a single person; for it makes it clear that a prescription cannot be established against the prohibition of such a law.

17. And taken in this sense, the principle or axiom of the jurists, to which we referred in our discussion of the last exception,[1] is valid, as is clear from the *Decretals* (Bk. I, tit. IV, chap. iv), which they cite in illustration of it. For simple priests cannot, by means of custom of any sort, acquire the right to administer the Sacrament of Penance,[2] since, notwithstanding any prescription or ancient custom whatever, the divine law denying them that right always remains unaffected, and no human custom can prevail against it. The same is true in respect of the positive law; for no disqualified person—for example, no illegitimate person—can, through his own custom, obtain by prescription a removal of his disability. The reason is that the invalidating ecclesiastical law [in that case] always

In what sense the above opinion is to be understood.

[1] [*Cf.* Sect. 13 of this Chapter, *supra*, p. 617.—Tr.]

[2] [A simple priest is one who has not received jurisdiction and approbation from his Ordinary to minister the Sacrament of Penance. Attempted administration, outside the danger of death, would have been invalid, because jurisdiction, being a positive grant, cannot be presumed.—Reviser.]

remains in full force, even though a general custom can effect a derogation from such a law. Thus, the argument for the contrary opinion[1] based upon an induction from the fact that custom cannot remove censures and the like, is of no avail against our thesis. For a custom cannot effect the removal of an excommunication without absolution, solely through some usage; but by derogating from the law which established excommunication as a penalty, can bring it about that this penalty is no longer incurred.[2] The same principle holds in respect of similar impediments.

18. The third exception relates to a law which not only enjoins certain actions, but also prohibits and forbids every custom of an opposite nature, and invalidates any such custom, not only past, but future.

The third exception.

For the discussion of this exception it will be necessary to distinguish three things, as we did in an earlier chapter, namely, the revocation, the prohibition, and the reprobation of a custom.

The three distinctions to be made.

For it is certain that, in itself, the express revocation of a custom by a clause attached to a human law, does not prevent the possibility of derogation from such a law, by means of a subsequent custom. The reason is that the law does not prohibit a custom in the future, as we proved above. Therefore, notwithstanding the revocation of the past custom, it is possible for a subsequent one to be just and reasonable as being one that has not been forbidden, and is not in its character essentially bad or lacking all reason: to assume that it must be such would be gratuitous.

What effect is produced by the revocation of a custom.

855 Therefore it can, by running the proper time, be established by prescription, whether the legislator has no knowledge of it, or whether, having knowledge of the custom, he tolerates it in such wise that his tacit consent is made manifest. Thus, such a custom can have the force of abrogating that kind of law. And so, commonly, exception is not made in the case of a law of this sort, as is evident from the previous discussion, and from what is said by Covarruvias (in *Variarum Resolutionum*, Bk. III, chap. xiii, no. 4). Reference may be made also to the discussion of this point by Burgos de Paz (Law 1, *Tauri.*, nos. 464 and 479).

Covarruvias.

Burgos de Paz.

19. But in the case of a law forbidding every custom of a contrary nature, even for the future, it might seem that an exception [to our rule] is highly probable [for the following reasons].

What effect the prohibition of a custom has.

First, because the custom in question, by the very fact that it is specifically prohibited, would seem to be unreasonable.

The first argument.

[1] [At the end of Sect. 13, *supra*, p. 618.—Tr.]

[2] [The absolution or removal of an excommunication is a positive exercise of jurisdiction, and, therefore, no custom could ever take the place of such a positive act.—Reviser.]

Hence, it can never be validated by prescription, and so, can never abrogate the law.

Secondly, because otherwise those words of the law which forbid a future custom would have no meaning. This is clear from the fact that the actions by which the custom could be established or set on foot, quite apart from the clause in which a future custom is prohibited, have been forbidden by the provisions of the law itself; the repetition of such actions is, therefore, obviously forbidden also. Therefore, for the prohibition of a custom of fact, those words were not necessary. They were, therefore, especially intended as forbidding a custom of law, unless we are to regard them as superfluous. Therefore, they either effectively prohibit this custom, so that its establishment in opposition to the law is impossible, and our thesis is established; or they do not produce this effect, and are meaningless, since, in that case, they add no force to the prohibition of the custom, and there is no other moral effect that they can have.

The second argument.

Thirdly, because, in the case of customs of prescription, by the very fact that the law forbids that a certain thing can be claimed by prescription, it is impossible to secure its prescription by any custom whatever (*Digest*, XLI. iii. 24). So, also, by the very fact that the law forbids any custom which is contrary to that law, the effectual result is that no custom can become prescriptive or can prevail.

The third argument.

20. Fourthly, because a custom cannot abrogate a law save by the tacit consent of the prince, as has been said; this consent, however, cannot be presumed where the legislator expressly withholds his consent to a future custom by a prohibition of such custom incorporated in his law. Therefore, . . .

The fourth argument.

Fifthly, because if the prince should declare that a law or a privilege can not be abrogated, unless by his express consent, that law or privilege could not be annulled through his tacit consent. But he does that precisely when he forbids the introduction of any custom contrary to his law. Therefore, . . .

The fifth argument.

Finally, because it is possible for a lawmaker to make void future contracts: therefore, he will be able also to make invalid a future custom; and this is his intention when he forbids such a custom, otherwise the prohibition would be, as we have contended, a useless one. Therefore, . . .

The final argument.

Gloss. Antonio de Butrio. St. Antoninus. Sylvester.

This exception[1] is indicated in the Gloss (on *Sext*, Bk. I, tit. II, chap. i); it is also found much more clearly stated in another Gloss (on *Extravagantes*, Tit. I, chap. ii). It would seem to have been defended also by Antonio de Butrio in his comment (*De Consuetudine* Chap. xi), by St. Antoninus ([*Summa*,] Pt. I, tit. xvi, § 6), by Sylvester

[1] [*Cf.* Sect. 18, *supra*, p. 621.—Tr.]

(word *consuetudo*, Qu. 6), by Angelus de Clavasio ([*Summa, Consuetudo*,] no. 9), by Baldus and by Bartolus (in Tract. *De Dotibus*, Pt. VI, privil. ii, nos. 18 and 19)[1] and finally, by Soto (*De Iustitia*, Bk. I, qu. vii, art. 2, words *Hoc ergo memoriae*). The same was apparently the view of Covarruvias (*Variarum Resolutionum*, Bk. III, chap. xiii, no. 4), and of many other authorities to whom he refers.

Angelus. Baldus. Bartolus Soto.

21. Nevertheless, I hold it as the more probable opinion that, if the law does no more than prohibit a future custom, and does not reprobate it, a subsequent custom which has the effect of abrogating the law may be introduced.

A simple prohibition of a future custom by the law does not make impossible the introduction of such a custom.

This is the doctrine of Navarrus (in Comment. *De Alienatione Rerum Ecclesiasticorum ac De Spoliis*, § 14, no. 8), a doctrine which he drew from the Gloss (on the *Constitutions* of Clement, Bk. I, tit. III, chap. viii). Vázquez (on I.–II, Disp. 177, last chap.) holds this opinion also, as does Soto but with some qualification. B. Medina (on I.–II, Qu. 97, art. 3) and Gutiérrez (*Practicarum Quaestionum Civilium*, Bk. III, chap. XXXII [quest. XXXI]) agree with this teaching also. Covarruvias [*Variarum Resolutionum, ibid.*] and others do not oppose it, although they do not state it in so definite a way.

Navarrus. Gloss. Vázquez. Soto. B. Medina. Gutierrez. Covarruvias.

The reason for our conclusion must be gathered from the foregoing discussion: namely, that, despite a legal prohibition of that kind, it is possible for the subsequent custom not to be an unreasonable one, as we have demonstrated. And since the condition as to the reasonableness of the custom can be thus fulfilled, so also may that which relates to the sufficiency of its length of observance. And this either by prescription, where the prince has no knowledge of the custom, or by an observance sufficient to indicate the tacit consent of the prince in cases where he has knowledge of and tolerates the custom. This principle is obvious, and has been sufficiently proved above.

Such a custom can, therefore, bring about the abrogation of that kind of law in two ways. It can do so, first, when the custom is reasonable and prescriptive, by the operation of the principle laid down in the *Decretals* (Bk. I, tit. IV, chap. xi); for no sound reason can be given for not applying it here, the law in question being a human law, however strictly it may prohibit a future custom. Or again it can, at least, avail for this effect, on grounds of natural [as distinguished from legal] reason, when the prince has had knowledge of it and it has run for a sufficient time to be evidence of his tacit will, for his will has the power to effect the revocation of the earlier law, notwithstanding any prohibition embodied in it. For this very prohibition of a future custom issued solely from the consent of the prince; and so, later, when that
856 sovereign or his successor has come to a knowledge of and tolerated the custom [prohibited by the law], and has tacitly consented to it, he

[1] [*Digest*, Bk. XXIV, chap. iii, in Bartolus, *Prima Super Infortiato*, nos. 18, 19.—Reviser.]

changes his former will, and in so doing abrogates the prohibiting law completely. A confirmation of this proof will follow from the refutation of the arguments[1] offered in support of the contrary opinion.

22. The first [of the six arguments alleged,] we deny, for the fact that a custom is unreasonable is one thing, but that it is forbidden is quite another: a custom can be prohibited even when it is not unreasonable; and again, a mere prohibition taken by itself does not make a custom unreasonable, as I have demonstrated above.

The answer to the first argument.

My reply to the second argument, which is not so easily disposed of, is that the first effect of the legal prohibition is that in the case of doubt—where, that is, the contrary is not clearly evident and established by proof—the custom is presumed to be unreasonable. For since the superior has specifically prohibited the custom, it would seem to be clear that he has done so because he has judged it to be an unreasonable one. This, I have said, is especially true when the matter is doubtful, as can be seen from the arguments offered by Rochus Curtius (*De Consuetudine*, Chap. xi, sect. 7, no. 24). A second possible effect of the prohibition is that the governors and guardians of the laws will be more vigilant, and will not permit the custom in question to be introduced a second time. A third is that the subjects of the law are probably, because of this specific declaration of the superior's will, bound under an especially strict obligation to abstain from the following of that custom. The fourth and chief effect of such prohibition may be this, namely, that the custom will never, or only very rarely, be able to effect a derogation from the law, save after a long period of time and the establishment of a legal prescription, since in a shorter period, the consent of the prince can hardly be presumed, even if he has knowledge of the custom, or, at all events, many more circumstances must be present and a much longer time than ordinarily is necessary for justifying a presumption of the superior's will as favouring a custom in opposition to such a law; the reason being that he has expressly and specifically declared a contrary will in the prohibiting clause of his law. It is in this sense, I believe, that Soto's opinion on this matter is to be understood.

The answer to the second argument.

Rochus.

23. The logical nexus of the demonstration in the third argument [Section 19, at the end] for the opposite view is denied.[2] For in the case of a true, private prescription, the will of the prince is never presumed to have changed; nor is there any legal rule that could give justification for the prescription thus prohibited by the law; but the custom at present under discussion has

The answer to the third argument.

[1] [In Sect. 19, *supra*, p. 621.—Tr.]

[2] [For the reason, apparently, that there is no parity between a prescription properly so called and a custom of the sort here discussed.—Tr.]

always the support of the law which gives validity to a reasonable and prescriptive custom; as well as that of the principle of natural reason [which gives the same effect to a custom sufficient to manifest] the tacit will of the superior to derogate from the law previously in force.

In reply to the fourth argument, I deny the minor premiss. For, even though the prince has expressly prohibited a future custom, he is free to change his will; moreover, he has never withdrawn its force from a prescriptive custom that is reasonable.

The answer to the fourth argument.

The major premiss of the fifth argument is true only if the prince holds firmly to his purpose; but he is free to change his mind [, in which case the argument fails]. Again, just as express derogation from laws carrying a prohibiting clause is made by terms that are (as it were) retroactive, as by derogation from a law by the special clause: 'Even if the law have such and such a clause'; or, again, by derogation in a general formula, as: 'Under whatsoever form of words the law was enacted'; so, too, in custom, all this retroaction and derogation is implicit, inasmuch as the custom manifests the final will of the prince which can prevail in opposition to every former law. The minor premiss also of this argumentation can be denied, for to forbid the introduction of a future custom, and to rule that a law is not to suffer abrogation except by an express act, are not prohibitions of the same force.

The answer to the fifth argument.

With regard to the sixth argument, it can be denied that this prohibition [of a future custom] is equivalent to an invalidation. The reason is that without invalidating the custom, the prohibition can have other effects, as we pointed out in our reply to the second argument.[1] To the objection that at times the word 'invalidate' is used in these clauses—as is to be seen from the above-cited *Extravagantes Communes* (Bk. I, tit. III, chap. ii)—I answer that an invalidation of this kind always depends upon the will of the prince; and that, therefore, since a custom can in the final issue be evidence of a contrary will on the part of the sovereign, a custom can, the invalidating clause notwithstanding, have its effect in that way in this case also—as we have shown in our demonstration that an invalidating law can be abrogated by custom.

The answer to the sixth argument.

24. Coming now to the third principal point[2] of our present inquiry, that is, whether a custom can annul a law that reprobates it, I assert that a contrary custom cannot abrogate a law of this kind unless there has been so great a change in the circumstances that there is certain evidence that this new situation has made the custom one of a different character. An abrogation of this kind is not, therefore, a real exception to the rule that we have laid down.

How a custom reprobated by a law can prevail against that law.

[1] [In Sect. 22, *supra*, p. 624.—Tr.]

[2] [Cf. Sect. 18, *supra*, p. 621.—Tr.]

Panormitanus.

Gloss.

Navarrus. Covarruvias. Tiraqueau.

The first member of our thesis is the common teaching on this point. There is little or no dissent with respect to it, as is evident from the opinion of Panormitanus (on *Decretals*, Bk. II, tit. XIX, chap. ii, nos. 7 and 8), and from that of other commentators on that Chapter. It is found also in the Gloss (on *Sext*, Bk. III, tit. iii, only chapter, word *improbantes* taken with the word *receperit*) and others on that chapter. This doctrine is followed by Navarrus and Covarruvias (*supra*, p. 623), and many other writers to whom they refer. Tiraqueau also defends this thesis in *De Utroque Retractu* (in Preface, Nos. 18 and 19).

The basis of this opinion is that such a custom is always unreasonable, as has been proved above; and that it can never, therefore possess the conditions for an effective custom laid down in *Decretals*, Bk. I, 857
tit. IV, chap. xi, nor can it be sufficient evidence of the tacit will of the prince.

Covarruvias. Sánchez.

The second part of our thesis is generally received doctrine, also. Covarruvias gives numerous references to writers who defend this opinion; and Sánchez, many more (*De Sancto Matrimonii Sacramento*, Bk. VII, disp. iv, no. 14).

The reason here is also clear: the law does not always reprobate a custom because it is intrinsically evil; it may do so because of some [annexed] danger, or because such condemnation is judged to be expedient under the circumstances in order to preclude certain effects detrimental to the well-being of the commonwealth or of the Church. In matters of this kind, it frequently happens that a custom which at one time is reasonable, is not so at another; and so, a custom unreasonable in one set of circumstances may not be so in another. Therefore, if the latter kind of reversal occurs in the case of a custom reprobated by law, the custom, notwithstanding the condemnation, ceases to be unreasonable: and this, either because at this later time the custom is, practically, not the custom mentioned by the law, or, because the portion of the law containing the condemnation has completely lapsed in its entire application, and so, too, its effect has lapsed. This law can, therefore, now be abrogated by the custom in question.

The third portion of our thesis is, then, easily proved; for the custom derogating from the law is, under these circumstances, always a reasonable one; and a custom is never incapable of producing this effect, except when it is either unreasonable, or has not been validated by legal prescription, or when it is insufficient as an indication of the will of the prince. There is, therefore, in the abrogation of this kind of law, under these conditions, no exception to the rule that we have laid down.

The fourth exception.

25. A fourth exception to that rule is maintained by many canonists: namely, that no law [of the Church] regarding matters connected with the Sacraments can be abrogated by a prescriptive custom.

Hostiensis.

The first proof in support of this thesis is drawn from the *Decretals* (Bk. I, tit. XI, chap. ii), where a custom allowing the promotion of candidates to Sacred Orders outside Quarter tense[1] is condemned. The second is drawn from the *Decretals* (Bk. IV, tit. XI, chap. iii), where similar customs are reprobated; and the third from (*ibid.*, tit. XIV, chap. v), where another such custom is rejected. The fourth is from the *Constitutions* of Clement (Bk. I, tit. VI, chap. iii), wherein is confirmed a custom touching the age of those who are to be raised to Holy Orders, a custom which had been introduced in opposition to the ancient canons, thus indicating that the custom could not have prevailed unless the Pope himself had confirmed it. Whence Hostiensis (in *Summa*, on *Decretals*, Bk. IV, tit. XXI, no. 2 [no. 3], at end) and some others hold that in these matters no custom can prevail unless there has been a law expressly derogating from the previously existing law. Others prefer the rule which requires at least a knowledge of the custom on the part of the Pope and his tacit consent. This is held by Richard Middleton (on the *Sentences*, Bk. IV, dist. XLII, art. 3, qu. 2) and by the Gloss, together with the comments of the Doctors (on *Decretals*, Bk. IV, tit. XXI, chap. iii). It is defended also by many other writers whose names are given by Sánchez.

Richard Middleton. Gloss.

The above exception is rejected.

26. Nevertheless, even this exception is not necessary: and this, for the reason that the laws cited give no ground for it. Again the rule of *Decretals*, Bk. I, tit. IV, chap. xi, is of general application; and there would seem to be no sound reason for making an exception in our present case. This is the view of many of the authorities whom I have cited above, and these deny in general the necessity of the prince's knowledge for this effect. De la Palu is especially clear upon this point ([on the *Sentences*,] Bk. IV, dist. XLII, qu. 3, art. 1); and thereon also (*Supplement* to Gabriel on the *Sentences*, *ibid.*, qu. 2, art. 2 [sole qu., doubt 6]). Sánchez holds this opinion and cites for it the authority of many other writers (*De Sancto Matrimonii Sacramento*, Bk. II [Bk. VII], disp. lxxxii, no. 20). Navarrus enlarges on this point (in *Enchiridion*, Chap. xxii, no. 83 [*De Benedictione Nuptiarum*]), where he censures Rochus for his doubt on this point (*De Consuetudine*, Chap. xi, sect. 4, no. 27). Rochus, however, inclines sufficiently to this opinion, and confirms it, but wishes to dissent modestly from the opinion of the ancient Doctors.

De la Palu. Gabriel. Sánchez. Navarrus.

Navarrus develops his proof of this assertion from the same *Decretals*, Bk. I, tit. XI, chap. ii [*Consilia*, Bk. I, *Consilium de Temporibus Ordinationum*, pp. 94 *et seq.*], which Hostiensis cited for his thesis. He does so, on the ground that the ancient custom spoken of in that law is shown to have been valid up to the time of its revocation

Navarrus. Hostiensis.

[1] [That is, the *quatuor tempora*, the beginnings of the ecclesiastical seasons, called Ember Weeks, on the Saturdays of which Sacred Orders could be bestowed.—Reviser.]

by the law, by the following words: 'Were it not for the great number [of ordained men] affected, and were it not for an ancient custom of the country, the persons who have been ordained in this manner ought not to be allowed to exercise the ministry, which they have received.' The Gloss here (on word *antiqua*, near the end) understands the word 'ancient' as meaning a reasonable and prescriptive custom, and that [such a custom] had established an excuse from fault, even in that matter. Thus, the first argument for the contrary thesis[1] is answered.

Gloss.

A confirmation of our refutation of Hostiensis's proof is to be found also in the words, 'unless there is a custom of the Church [to the contrary]' (*Decretals*, Bk. IV, tit. xi, chap. i), where the reference is to a matter touching the Sacraments. It is true that the custom there spoken of is one not directly counter to a preceptive law, but one superior to it, or counter to a permissive law. But surely, if it is possible for a custom to introduce a new law and obligation in matters relating to the Sacraments, there is no reason why it cannot abrogate laws relating to such matters.

We have here the principle for the refutation of the second and third arguments, of our opponents. For those laws do not assert that the customs in question could not be valid because they dealt with matters relating to the Sacraments, but because they are either judged to be unreasonable, or are reprobated for causes that were just.

On the other hand, however, the answer to be given to the fourth 858 argument, that drawn from the *Constitutions* of Clement, is that the custom there referred to was confirmed, because the Pope wished to give it his express approbation, and not because it could not have prevailed antecedently against the ancient canons without such approbation.

The rule stated at the beginning of Chap. XVIII suffers no exception.

27. Whence my final conclusion is that the rule we have given suffers no exception; since, besides those we have considered, no other objections that might be valid against our thesis suggest themselves, nor do the Doctors mention any. In any case, the principles we have set forth would seem to apply with like effect against any other such exception that might be brought up. Hence, Navarrus (*Consilia*, Bk. I: *De Maioritate et Obedientia*, cons. iii) rightly observed that, 'every custom of a reasonable and prescriptive character is valid against any human law whatever'. The addition of the words 'every' and 'whatever' sufficiently signify that in his opinion there is no room for an exception. Finally, whenever a custom, even though it is of long standing and general in character, is stated by the law as not prevailing over a law, a reason is always given for this rejection of the custom: as, that it is unreasonable or a corruption of law, or the like. This is proof

Navarrus.

[1] [In Sect. 25, *supra*, pp. 626–7.—Tr.]

that a custom which is reasonable and of a sufficient antiquity lacks nothing for effecting a derogation from a law.

Of the extension of custom.

28. It remains now to inquire whether our rule[1] admits of any extension, or enlargement. But on this point the jurists generally, even though they admit extension in the case of a custom outside the law, lay down the rule that a custom contrary to law and abrogating it is not to be extended. This is the view of Abbas [, i.e. Panormitanus,] (on *Decretals*, Bk. I, tit. iv, chap. ii, last no.), as well as that of Innocent on the same law. This opinion is developed at length by Jason also (on *Digest*, I. iii. 32 [, nos. 14, 21]). Rochus gives the question extensive treatment (*De Consuetudine*, Chap. xi, sect. 4, from no. 7 to no. 23), where he sets down nine conditions [under which this rule may hold]. A discussion of these conditions is not necessary here; for, as I have said, the principle which applies here is that which applies in the case of written laws or statutes. And therefore, just as one law revoking another is not regarded in itself and generally speaking to be extended, for the reason that it is held to be irksome and, in a certain sense, a burden—as is clear from the principle that the amendment of laws is to be avoided—so also a custom abrogating a law is held to be irksome and, in a certain sense, a departure from normal ways, and is for this reason restricted as to its legal bearing, and is not to be extended. Should the matter of the custom be, however, of such a nature that the custom can be held to be in every way favourable, it may receive that extension which favourable grants allow, provided such extension does not go beyond the bounds of the custom—which, in Baldus's phrase, is to be observed with perfect exactitude (on *Code*, VI. i. 4, no. 20 [no. 17]). Of this sort of extension, as it is treated by the jurists, nothing further need be said here.

That a custom contrary to law can be extended is denied by Abbas, Jason, Innocent, and Rochus.

What effect has a custom contrary to laws?

29. There remains, however, the particular question whether a custom contrary to law can not only derogate from law, but introduce new contrary law also. For sometimes a law may be abolished in such a way that it merely ceases to exist; that is, in such a way that it is no longer binding. In this case the acts specified by it are not forbidden, nor, on the other hand, are actions contrary to it prescribed. Again, at times, a law is abolished by (as it were) a contrary disposition; that is, an action that the abolished law forbade is enjoined, or an action that was of obligation under the earlier law is forbidden. I hold that both kinds of derogation can be introduced by legitimate custom.

Solution.

The proof of this assertion is that both these effects are possible through the agency of written law: they are, therefore,

[1] [Set forth at the beginning of Chap. XVIII.—Tr.]

equally so through custom. Likewise, a custom can be established in opposition to an existing law, for any one of the above-named reasons and purposes, and, at the same time, it may be reasonable and validated by an adequate prescription.

In order, however, to clarify our notions concerning this prescription, there remains the further question whether these two effects may be produced simultaneously, and through one and the same custom, or whether they must be brought about only successively. That they can be brought about successively is very obvious. The reason is that the law can be first abrogated in a purely negative way by a legitimate custom, and this, with the sole purpose of removing the obligation; and afterwards the custom may be continued to be observed with the object of establishing a law. This continuance will be, in effect, a wholly new custom, for from the time when the abrogation of the law occurred, the custom has been a custom not contrary to the law, but outside existing law. As such, then, it will have to run for another period in order to establish a law; that period, however, need not be greater than the usual long time which suffices for the introduction of custom outside law.

A difficulty.

30. The point of the question is, then, whether both of these results can be accomplished at the same time, and by the same actions. It would seem that this is not possible, for the reason that so long as the existing law stands in opposition, it is impossible for another to be introduced, since the express consent of the prince cannot be in contradiction to his tacit consent. Therefore, it is necessary that the law previously existing be abrogated, in order that another may be introduced. It is, therefore, set down in *Las Siete Partidas* (Pt. I, tit. ii, law 3) that it is not possible for a usage contrary to law to establish a new legal rule, unless the earlier law be first abolished.

Nevertheless, I maintain that a law may be annulled, and its contrary established at the same time, and by the same custom. The proof is that a custom may be reasonable in both respects, and be observed 859 with the intention of bringing in both at the same time; it can therefore, after it has run a sufficient length of time, be validated either by prescription in respect of both its effects, or be evidence of the tacit consent of the prince with respect to both.

A confirmatory proof of this conclusion is that by one action, expressly making a law contrary to a previously existing one, the first can be abolished, and the other expressly established. The same, therefore, is true of a tacit operation of the same kind; for the reason in each case is the same. Nor does the proof to the contrary hold, since for this effect a priority in the order of nature—to use our common terminology—is sufficient. For it is true that a custom contrary to a law cannot establish a new law unless the contrary legal rule is first abolished; it is, however, sufficient if the abolition of the earlier law take place at the same time, and that the abrogation of the prior law occur first—in the order of nature according to our mode of conceiving the matter. For, in that order, the abolition of the earlier law is absolutely the earlier effect, because abolition of the law is a necessary disposition for the establishment of the later one; and this disposition is created not proximately and immediately and (as it were) formally, through the introduction of a new law, but through the abrogation of the old one, and this abrogation can, absolutely speaking, be accomplished without the establishment of a new legal rule. And in this sense, the law [of *Las Siete Partidas*] can be sufficiently intelligible, whatever Gregory López, in his comment thereon, may appear to think.

CHAPTER XX

IN WHAT WAYS CUSTOM MAY BE CHANGED

Of the change of custom.

1. Although we have given, in the preceding Book,[1] some general attention to the subject of change in written human law, and while the principles there set forth are for the most part applicable to consuetudinary law, we must, nevertheless, take up here the discussion of certain other points which would seem to be peculiar to that kind of law.

Two modes of change.

Change in the written law can—as we have seen in an earlier book of this treatise[1]—be effected in two ways: in the one, the change is (as it were) intrinsic, that is, brought about by mere cessation due to conflicting circumstances; in the other, the alteration is induced by the contrary action of some external agency. Custom also can be changed in both these ways. With regard to the first of these, we need add nothing to what we have said in the passage referred to, save that a custom may, of itself, cease to exist on the sole ground of a change in the circumstances affecting the rectitude or the general usefulness of its subject-matter, and this, without a revocation by any external agency. That the subject-matter of a custom can change in this way is self-evident: both from experience, and also from the natural condition of things human. That this change in the matter of a custom may be such that the custom of itself ceases to be and loses its binding force, is clear from the principle that the custom must always have a good ground in reason, to be established, and must have been introduced to realize some sufficient purpose: the essential nature of law demands this. If, therefore, the matter is so changed that the reason and purpose of the custom disappear, not only in individual cases, but universally, then the obligation of the custom will lapse also.

[1] [Bk. VI, chap. ix, sections 1, 9, *supra*, pp. 419, 426.—Tr.]

Indeed, should the change in circumstances be such that the purpose for which the custom was introduced does not so much disappear as work harmful effect, then there may be a positive duty not to observe the custom. This would be the case should the custom begin to be a moral occasion of sin,[1] or be otherwise harmful to the general good of the commonwealth. The same will be true, if, in some particular case, the reason for the custom not only ceases to be, but would even be harmful. This principle we have shown to be true of written law, and it is equally applicable to custom.

Finally, it is clear that this is the only way in which custom can, of itself, cease to exist; since it is not dependent upon any other cause as an active principle to preserve it (as it were) in being. For although the custom may depend upon the will of the prince, the fact that he does not revoke it, is enough for its preservation; and the same is true also of the popular will, in so far as the custom is dependent upon it.

The revocation of a custom.

2. We shall, therefore, without further discussion of this kind of change, give our exclusive attention to such revocation of custom as is brought about by the prince through a law, or through an express declaration of his will, or that which is effected by the people through an expression of a contrary will. These two kinds of revocation, with which many laws deal, have been set forth in [*Las Siete Partidas*,] Part I, tit. ii, law 6. And by revocation we mean in this connexion not only the complete abrogation, but also the partial derogation of a legal custom, since the two are of a similar nature. It will not be necessary in this discussion of the law of custom to say anything of dispensation, for the reason that it is included either under partial revocation, or, in so far as it differs from that, either pertains to the matter of privilege—of which we shall speak in the following Book[2]—or will be the same in principle as dispensation in human law, of which we have spoken at length in a previous Book.[3]

A custom is revoked by a subsequent law in opposition thereto.

3. My first assertion, then, is that a custom is revoked by a subsequent law in opposition to it, especially when the legislator has knowledge of the custom. This assertion assumes authority in the prince who has power to make laws that may revoke custom. Such is manifest from *Decretals* (Bk. I, tit. iv, chap. ix), from *Sext* (Bk. I, tit. ii, chap. i), and from *Code* (VIII. lii (liii). 2). For what is there stated, namely, that custom has not force sufficient to prevail over law, is especially true in one sense of a law enacted subsequent to a custom. The reason is clear, since the custom has no force save through the consent, at least in a tacit form, of him who has the power to make the law; and therefore, 860

[1] [A moral occasion of sin, that is, observance of the custom, would be an incitement to men to do evil. Its influence would be on the passions or will of men.—Reviser.]

[2] [Not included in these *Selections*.—Tr.]

[3] [Book III, *supra*, p. 361.—Tr.]

through his will the custom may be revoked, and lose all its force, and even be forbidden, and its contrary prescribed. For if it is possible for the prince, through a subsequent law, to revoke a prior one made by his express will, why is it not possible for him to revoke, by a later rule of law which has his explicit approval, a custom introduced with his tacit consent? On this point, therefore, there is no controversy nor any reason for doubt—if the clause is added: 'Custom to the contrary notwithstanding'—that, then, a custom is undoubtedly revoked, because the legislator could not express his will more unmistakably.

An objection.

4. An objection may be offered at this point, from the law on *Feuds* [law *De Feudi Cognit.*, Bk. II *Feudorum*, tit. i],[1] which states that, 'The authority of the Roman laws is not of small moment, but it does not extend so far as to override usage and the general customs of the people.'

Gloss.

Objection answered.

My reply, in the first place, is that the Gloss understands this to be true of feudal matters alone, but gives no reason for so doing. Cujas, in his notes on this law, understands it to refer to a custom confirmed by a decision given in a trial when the custom is impugned. But even this kind of custom may be abolished by law. Others interpret the law in question as referring only to places not under the authority of Rome, where the laws of the Romans have not the force of law, save in so far as they have been accepted by the local sovereigns, and the law says that it is in such localities that custom should have preference over the laws of Rome. But, first of all, this reasoning makes the opinion foolish, for what is strange in the fact that a law of another jurisdiction that has no power to bind, should not prevail in the face of a custom which is binding and peculiar to the place? Again, the reasoning there is far from adequate, as Obertus's note on the law makes clear: 'Decisions on feuds are usually said to be contrary to our own legal rules.' Whence Baldus says that the meaning there is that feudal litigation is to be settled by custom, and not through the written laws, whether of Rome or of the Lombards. Baldus is here referring, it is my opinion, to general laws; for if there were in force special written laws, enacted by competent authority, relating to feudal tenures, these would prevail over custom, in accordance with the rule we have laid down. Hence the meaning is that in feudal questions, the customs peculiar to these must be followed, notwithstanding the provisions of general written laws to the contrary. Or at least these words may be held to apply to prescriptive custom, upon which feudal rights are for the most part founded; and the reason is that the Roman laws are not prejudicial to this sort of custom, inasmuch as they do not abolish rights and ownerships acquired by prescriptive custom.

Baldus.

[1] [A collection of Lombard feudal customs was added to the collections of Roman Civil Law, and appears under the title, *Feudorum Libri cum Fragmentis*.—Reviser.]

5. This assertion[1] applies especially to laws which contain the clause 'notwithstanding an existing custom', since no clearer statement of the legislator's will is possible. But when no such clause is added to the law, there is required, first of all, that there be between the law and the custom a contrariety such that the law cannot be obeyed if the custom is observed. For if they can be reconciled in such wise that the law can have its own effect without derogation from the custom—if necessary even by as strict an interpretation as the words of the law will bear, without destroying their proper meaning—the law is to be given an interpretation admitting of such reconciliation. The reason is that the amendment of a law is to be avoided; and much more so that of a custom so far as is possible: and this, both on the ground that a custom becomes (as it were) a second nature, and hence a change in it is not easily made; and again, because the law should be in harmony with the general conduct of the people who observe the laws.

What is required in order that a custom be revoked by a law?

6. In order, then, that a law revoke a custom by its own force and without the aid of an express revoking clause, it is necessary that the two be in every way repugnant and opposed to each other. Further, the consent of the prince is essential, since through that the revocation is accomplished; and since, for his consent, knowledge of the custom is a prerequisite, he must be presumed to have such knowledge. And it was for this reason that this condition—around which are centred all the difficulties of our present question—was set down by the Pope [as necessary for the revocation of custom by a law], in the *Sext* (Bk. I, tit. II, chap. i).

First inference: that a general custom is revoked by a general law.

7. From that text and the condition it lays down, it is inferred, first, that when, for example, a custom is universal—one, that is, which has been observed throughout the entire Church—and a law in opposition to it is enacted for the Universal Church, the custom is wholly annulled by the law, even though the law contain no derogating clause. This is the opinion of Baldus and other commentators (on *Code*, VIII. lii (liii). 2). Baldus. It is that set forth by Felinus (on *Decretals*, Bk. I, tit. III, chap. xx, no. 8, words *tertia regula*, and on *Code*, VII. lii. 1, no. 4, ampliat. 3). Felinus. It is to be found in the *Decisions of the Rota* (Decision 2, *De Rescriptis, in novissimis decisionibus*, no. 2), and it is clearly to be drawn from the *Sext* (Bk. I, tit. II, chap. i, in the passage beginning *Singularium consuetudines*). Rota. For by this phrase [the above-cited chapter of the *Sext*] excludes general [customs and laws], as the Gloss thereon also notes.

The reason is that a subsequent general law revokes a previous one of the same order, even though it makes no mention of the latter, as is 861 stated in the aforementioned chapter [*Sext*, Bk. I, tit. II, chap. i]. But

[1] [*Supra*, p. 632.—Tr.]

a universal custom has the same force as a general law, and has the standing of an unwritten rule of the canons, or of the civil law. Therefore, . . .

Likewise, the prince, who is held to have all laws locked within his own breast (as is stated in *Sext*, Bk. I, tit. II, chap. i and in *Code*, VI. xxiii. 19), is held not to be ignorant of a universal custom; and he is, therefore, assumed to revoke such a custom when he enacts a new law, in the presence of which the custom can no longer persist.

The application of the foregoing rule.

8. And this rule holds true in due proportion for every diocese with respect to the synodal laws and general customs of that diocese. It is likewise true of the civil laws of the various kingdoms with respect to the general customs that obtain in those kingdoms: the principle is the same. For this reason, Abbas [, i.e. Panormitanus,] says (*De Consuetudine*, Chap. xi, last no.) that if a city makes a statute in opposition to one of its own customs, the latter is then revoked, even though the custom is not mentioned. The reason is that the city is presumed to be aware of its own customs, since they are not introduced without the knowledge of the people. But I think that this assertion is to be taken with the proviso that the city in question shall have absolute authority in legislation; or if it shall have the power of legislation only with the permission of the prince and subject to his confirmation, that the people shall inform him that the law which is to be passed revokes the custom (argument of *Decretals*, Bk. I, tit. IV, chap. ix). The reason is that the prince could not otherwise give his consent to revocation of the custom, since he is not presumed to have knowledge of a private custom. Again, he would permit the enactment of such a statute much less readily and only after very careful consideration, if he were to have notice of the existence of the custom. And finally, by the common law it is provided that a change is not to be made in any custom (*Digest*, I. iii. 23)[1]; therefore, in order to enact, with the sovereign's permission, a statute opposed to a custom, the fact of the existence of the custom must be called to his attention. Abbas.

I note, finally, that the foregoing assertion or conclusion holds true no less in the case of an immemorial custom, than in that of any other custom which has been validated by prescription. For if the law is fully as universal in character as is the custom itself, even though the latter is not expressly mentioned in the law, it is nevertheless revoked by the said law. The reason is that previously given: the custom in question is presumed not to be unknown, and it possesses no more than the force of a positive common law. In fine, the custom here is held to be revoked not in virtue of a universal derogating clause under which it is to be supposed especially to fall, but by the positive knowledge of it on the part of the prince, who, notwithstanding such

[1] [*Digest, loc. cit.*, has: *Minime sunt mutanda quae interpretationem certam semper habuerunt.*—Reviser.]

knowledge,[1] desires to make a law which cannot be valid unless he revokes the custom in question; therefore, [by enacting the law under these circumstances,] he also revokes the custom.

9. The second inference from the same condition and rule is that a universal law framed for the whole Church does not revoke the particular customs of dioceses, cities, or provinces, unless there is added to the law the clause *non obstante* (notwithstanding), revoking them in specific or at least in general terms. This statement holds also, in due proportion, for the laws of kingdoms, or of provinces—in so far, that is, as they are universal in those provinces—in their relation to the customs of particular localities of the kingdom or of the province: in these cases also the same principle applies, and there is the same application of jurisdiction.

Second inference.

Thus, therefore, our statement is expressly set forth in the aforesaid *Sext*, Bk. I, tit. II, chap. i. The basis for it in reason there given is that a universal lawgiver is assumed not to know of the particular facts with respect to which the customs of particular localities are ordered. He is, therefore, held not to will the revocation of such customs by a general law, unless he expressly makes reference to them, or, at least, causes a general revocation of all contrary customs by adding the clause *non obstante* (notwithstanding), &c.

Gloss.

The Gloss and the Doctors in their observations (on *Sext*, Bk. I, tit. II, chap. i, and on *Decretals*, Bk. I, tit. IV, chap. xi) agree in holding this opinion, as does Panormitanus in his commentaries on those chapters (no. 24); Rochus (*De Consuetudine*, Sect. 7, no. 30) and Paul de Castro, Jason, and others (on *Digest*, I. iii. 32) take the same view. But Bartolus in commenting on the same law 32 [on *Digest*, I. iii. 32, in lect. no. 5], cites Guido to the contrary, and he himself seems to hold the same opinion with respect to the civil law on the ground of *Digest*, XLVII. xii. 3, § 5, although he admits our opinion with respect to the canon law. Panormitanus also takes the same position (*supra*). Azo defends this opinion in his *Summa*. Hostiensis cites Azo and follows his doctrine (*Summa*, on *Decretals*, Bk. I, tit. iv, no. 10).

Panormitanus. Rochus. Paul de Castro. Jason. Guido. Panormitanus. Azo. Hostiensis.

But, as a matter of fact, Bartolus disapproves of the doctrine of Guido[2] and, accepting the teaching of the canonists, especially that of Giovanni d'Andrea (on *Sext*, Bk. I, tit. II, chap. i), defends the common opinion. That this is his conclusion and doctrine—in principle—is very clear from *Repetitio*, no. 5. He there makes it clear that, even 863 though this rule is not so expressly stated in the civil as it is in the canon law, nevertheless, the principle of *Sext*, Bk. I, tit. II, chap. i, holds true for all law; and that it does not so much set up a legal rule for one order of law only, but rather declares one that has, according to right reason, application in that of every legislator. And with respect

Bartolus. Giovanni d'Andrea.

[1] [Reading *qui ea* for *qua*.—Reviser.]

[2] [i.e. Archidiaconus.—Tr.]

to *Digest*, XLVII. xii. 3, § 5, he replies in a word (in his comment thereon) that we must understand it to refer to custom of which the prince had knowledge, or which he expressly willed to abolish, should it be in existence. This reply amounts to the extending of that text from a statute to custom, if the custom be understood to be one existing antecedent to the law in question. But it has other meanings also, as I have said above. In this meaning, the law (*Las Siete Partidas*, Pt. I, tit. ii, law 6) must also, it would seem, be taken, when it says that it is possible for a subsequent law to abolish a contrary custom, even though Gregory López (*ibid.*, in Gloss 6) understands it to hold absolutely and independently of conditions, citing in support of his opinion the authority of the aforesaid section 5 (*Digest*, XLVII. xii. 3, § 5).

Gregory López. Gloss.

10. The question arises as to what custom this rule is to be held to apply; to a prescriptive custom only, to one, that is, which has already introduced law, or to one of shorter duration, also? For the above-cited Doctors have nothing on this question, and they set forth their opinion in general terms without explicit reference to these differences in the kind of custom. They would, then, seem to have had in mind legal custom—that is, custom which has introduced a rule of law—and furthermore, custom validated by prescription: for they are speaking of a custom of which the prince is presumed to have no knowledge, and custom of that kind cannot establish a legal rule, unless it be validated by prescription. Again, I find the word *praescripta* added to the Gloss (on *Sext*, Bk. I, tit. II, chap. i, word *facti*).

A question raised.

Gloss.

The same conclusion may be drawn from the *Sext* (Bk. I, tit. II, chap. i), where we find the word *derogandi* used; for there can be no derogation in the strict sense of the term except from an earlier law[, in this case, that of a custom validated by prescription]. Conversely, a special custom is held to derogate from a general law for the reason that a special law derogates from a general law; and this, even if the special law was in existence before the general one came into being. This is true, first, as a rule of law; and again, because it is based on the principle that the prince is not presumed to derogate from a special law of which he has no knowledge. Therefore, the custom in question is to be assumed to be such as shall have introduced law. A final argument here is that this rule [of *Sext*, Bk. I, tit. II, chap. i] must have reference to a custom validated by prescription, for no other custom can be designated which, of its nature, should subsist in the face of a later general law.

11. Nevertheless, I must call attention to the fact that in the aforesaid chap. i [*Sext*, *ibid.*], which rules that particular customs are not revoked by an absolute law framed in general terms,[1] it sets down only one

Certain necessary considerations on the aforesaid chapter of the *Sext*.

[1] [The actual words are: *ipsis, dum tamen sint rationabilia, per constitutionem a se noviter editam, nisi expresse caveatur in ipsa, non intelligitur in aliquo derogare.*—Reviser.]

condition with respect to the customs in question, namely, 'provided they are reasonable'; and does not add the condition, 'provided they are validated by prescription.' It is, therefore, not to be added by us. Hence, when the Pope wished validation by prescription to be an essential condition, he never failed to include it, as is clear from the *Decretals* (Bk. I, tit. IV, chap. xi).

Likewise, the reason there given is that the custom [stands in the face of a contrary general law because it] is something in the sphere of fact. I conclude, therefore, that even though it has not developed to the point of establishing law, the basis of that law exists in it, in respect of the prince's having no knowledge of it, and he is, therefore, presumed not to revoke it.

An objection.

One may object that the custom is in that passage termed a custom 'of fact', inasmuch as it is distinguished from a common law, just as a statute is said to be one 'of fact', not because it is not law, both general and particular, but because its enactment has been brought about by special facts. And so this passage is to be taken as referring to prescriptive custom; for, granting that the same reasoning holds true of non-prescriptive as of prescriptive custom, with respect to the ignorance of the prince with regard to the custom, it does not hold true in this respect, that the prince is presumed not to have willed to set up by his law an obligation in opposition to such an inchoate custom of fact. And this, for the reason that, since such custom has not established law, the question of derogation from it—a question which *is* relevant in the case of a custom which has established law—would be without meaning. [The law has, therefore, reference to an established custom 'of fact', in the sense that we defined those words, and not to one that has not yet established law, that is, which is still an inchoate custom of fact.]

The objection is refuted.

Granting the difference between the two kinds of custom, I still hold that my inference stands, since in respect of [the principle involved in] the reason laid down by the law—that the prince is not presumed to will the enactment of law inharmonious with the customs of those whom it is to bind—the two are to be regarded in much the same way. And this reasoning holds for any custom which is firmly rooted in observance, even though it has not yet been validated by prescription. This conclusion is further strengthened by the rule of law that a general enactment does not regard what is particular, which the legislator would probably not have wished to affect by his legislation had he been aware of it; and by the fact that the forcing of the people to change a custom which is contrary to a general law, especially a custom which the prince would have taken into very serious account in the framing of his law had he known of it, is attended by difficulties beyond the ordinary. Therefore, it is very improbable that this law intended the revocation of custom of this kind.

12. For the foregoing reasons, I think that the rule stated in the aforesaid chap. i [*Sext*, Bk. I, tit. II, chap. i] is not to be restricted to a prescriptive custom, but must be understood to extend to any reasonable and just custom which has been confirmed, both by public usage and observance, through a period which would be sufficient for the introduction of a legal rule, if the prince had knowledge of the custom, and if it would appear very probable to a prudent mind that the prince would have given his approval of the custom, provided it had come to his knowledge. Under these conditions, it is most improbable that he would wish to legislate against the custom by a general law, or that he would wish to abolish it—since he has no knowledge of it—without declaring his will in express terms to that effect.

In what way the rule of that text receives a broader interpretation.

For to this sort of custom, both the words and the principle of the aforesaid chap. i [*Sext*, *ibid.*] apply exactly. Therefore, the phrase 'to derogate' is rightly used in connexion with this kind of custom also. The reason is, first, that the phrase is commonly used in connexion with
863 other laws of justice which are not truly written laws—for example, when we say that the prince, in conceding a privilege, does not wish to derogate from the [established] rights of a third person; secondly that, such a custom would of its own virtue be sufficient for the establishment of a legal rule, were not this prevented by the sovereign's ignorance of the custom; and finally, that the people already possess a certain right not to be forced to change such a custom, from which the prince is not to be understood as wishing to derogate, unless he gives clear manifestation of such an intention. This, then, is our reply to the argument given against our position.

The answer to the question.[1]

13. And to the last reason advanced in support of the opinion, I reply that it is true that no fixed period of observance can be set down as marking the custom referred to by that rule; but it can be said, that that period is sufficient which a prudent judgment will regard as such. In principle, the manner of determining a sufficient duration of the custom here in question will be that which we indicated in our discussion of non-prescriptive custom with respect to its establishing law in cases where the prince has knowledge of it. In such cases the sufficient period of observance is not [always] of the same length, or a fixed one for all customs of that kind; it is, rather, to be determined by a prudent judgment which takes into account the circumstances of the custom. A like duration determined in the same way, is, we hold, sufficient for the custom we are here discussing. All those, certainly, who teach that custom never

[1] [i.e. the 'final argument' at the end of Sect. 10, *supra*, p. 637.—Tr.]

establishes law, except when the prince has knowledge of it, hold our opinion in principle; for they cannot deny the rule laid down in the aforesaid chap. i [*Sext*, Bk. I, tit II, chap. i.], namely, that a general law does not abrogate a particular custom of which the prince has no knowledge, although, according to their teaching, it has not yet established law.

Finally, it would seem to be accepted usage that in the defence of a particular custom against a general law, the 'long time' necessary for validation by prescription is not to be rigorously considered or urged, but that, rather, the rectitude of the custom and the fact that in the opinion of prudent men it is sufficiently established, are to be urged.

14. A second difficulty with respect to that rule may be raised, namely, whether a particular law enacted without conditions by the Pope, or by some other prince of universal authority, for a certain locality—diocese, &c.—effects a derogation from a particular custom of that locality in opposition to the law in question. The reason for the question is that the law derogates from an antecedent custom, provided the two are (so to speak) properly comparable; as, a general law with a general custom; a particular law with a particular custom. We have already dealt with this question in respect of a general law and a general custom in our discussion of the rule touching that point; and there would seem to be an analogous relation between a particular law and a particular custom. It was for this reason that in setting forth the rule on that point, we stated that a private custom is revoked by a local statute enacted by the community concerned if it has the power to make statutes, even if the custom is not mentioned in the statute. Therefore, the same holds true *a fortiori* of a statute enacted by a superior prince, since his authority is much greater.

A second difficulty.

15. Nevertheless, it would seem that we must assert that the custom is not immediately revoked by a law of this kind, save with the previous consent of the people, or where it is evident by petition or information, or in some other way, that the law was enacted by the prince with full knowledge of the custom in question. The reason is that the rule of the aforesaid chap. i [*Sext, ibid.*] applies no less in the case of a law of this kind, than in that of a general law; because it is not to be presumed with less reason that the prince is ignorant of the private custom in his making of one law, than in his making of another; nor, supposing that he has no knowledge of the custom, is he to be presumed willing to derogate from it, unless he expresses a will to do so.

A particular custom is not revoked by a particular law made by the Pope, except under certain conditions.

Here we have a marked difference between a universal sovereign and a particular and local one, when they exercise legislative authority:

in the prince, such ignorance of the local custom is assumed to exist; but in a particular community or governor it is not to be so assumed. Thus the words of the aforesaid chap. i [*Sext, ibid.*] hold generally for every 'constitution newly published by the Pope'. The inference is sound; for, since doubt or obscurity on the point is possible, it is to be held that if the prince had wished that his particular law should prevail, notwithstanding a contrary custom, he would have made known his intention. For this is what is done in most generally accepted usage, and it is in conformity with the law. Hence, when he does not add a clause expressing such an intention, he must be presumed not to have willed to revoke the custom.

This principle must, in practice, be kept in mind with regard to many laws, which are particular with respect to the authority from which they emanate, and also with respect to the community to which that authority is extended, but which are enacted as general for some diocese or congregation, the customs of which, even though they are general for that diocese or congregation, are particular from the standpoint of the prince; they are, therefore, held not to suffer derogation by laws of this kind, unless a derogating clause is incorporated in the law. And so a custom is held not to suffer derogation through a privilege granted by the prince, except when the privilege carries a derogating clause—as will be made clear later in its proper place.

16. An objection may be drawn from the reason set down by the Gloss (on *Sext*, Bk. I, tit. II, chap. i, word *singularium*); namely, that such a law would be useless and superfluous, since it would have no effect in any place. For a general law, even though it may not abolish a custom in one place, is not useless, for the reason that it would be binding upon the remainder of the whole community. But a law made for a special place or congregation, if it is there obstructed by a particular custom of a contrary nature, will be useless. Likewise, to persist in the observance of that particular custom in contempt of his law would seem to be opposed to the obedience due to the superior prince.

An objection from the Gloss.

But the reply can be made, that this law is, of itself, useful and efficacious; but accidentally, by reason, that is, of the prince's lack of knowledge of the custom, it is of no effect. Nor is this [nullification of the law] contrary to the obedience and reverence due to a superior; for it is held to be in accord with his will, as manifested in the common law.

The reply.

I note, further, that the law in this case is not useless, nor is it wholly lacking in effect; for it obliges the subjects reverently to accept the law, and to have recourse to the superior, calling his attention to their custom, and presenting the reason for it, with the intention of obeying the law, if, notwithstanding his present knowledge of the

custom, the superior still wishes that the law should be observed. Meanwhile, however, they are not bound to act against the custom. These reasons are excellently borne out by a parallelism found in the *Decretals* (Bk. I, tit. III, chap. v), and by the observations that are there set down.

17. Finally, we must make clear what words are to be added to a general law, or a law of the prince, for it to be held as abrogating custom. For in the aforesaid chap. i [*Sext*, Bk. I, tit. II, chap. i] we find the words, 'unless express provision is made in the law'. On this, the only point calling for observation is that, in these cases, the derogation is usually effected through the words, 'notwithstanding a contrary custom', or by others of the same or like import, or a clause of virtually the same meaning. I shall explicitly discuss these clauses in Book VIII,[1] in connexion with the revocation of privileges.

What words must be added to a general law, in order that the custom may be held to be abrogated?

Enough has been said in earlier books of this treatise as to when clauses of this kind do no more than revoke a past custom and when they prohibit, or even reprobate, a future custom. The only question that remains for us in this matter, is whether an immemorial custom also is to be held abrogated by clauses of this kind expressed in absolute terms; or whether this is true only of customs of whose beginnings we have definite knowledge.

Three opinions as to when an immemorial custom is held to be abrogated.

On this point, there are three opinions. The first one affirms absolutely that by means of the clause, 'notwithstanding custom to the contrary', every custom, even an immemorial one, is revoked, even when to that clause the distributive 'whatever', or one similar to it, is not added. This is the doctrine of the Cardinal.[2] The reason that can be given for this opinion is that the negation is sufficiently distributive in itself, since it removes *all* contrary customs.

The first opinion.

The Cardinal.

The second opinion is that, with the addition of the distributive 'whatever', immemorial customs are included in the revocation; but that they are not so included when that word is not used. This opinion is defended by many canonists, and it is to be found in the Glosses cited by Covarruvias. The reason for the exemption of immemorial custom in the first case may be its special character; the ground for holding it revoked in the latter will, then, be that the duplication (as it were) of the distributive is intended to overcome the exemptive character of such custom.

The second opinion.

Glosses. Covarruvias.

18. The third opinion is that, even with the addition of the distributive 'whatever', an immemorial custom is not revoked, unless in the revoking clause the words, 'even if it is immemorial', or their equivalent, are included.

The third opinion.

[1] [Not included in these *Selections*.—Tr.]

[2] [i.e. Gratian.—RevisER.]

This opinion is held by many jurists. They are referred to by Covarruvias and Tiraqueau, who follow their doctrine; the former does so in *Variarum Resolutionum* (Bk. III, chap. xiii, no. 5); the latter in *De Utroque Retractu* (Tract. II, § 1, gloss 2, no. 25); and it is suggested in Gloss on *Authentica ut de caetero*, chap. i, word *praescriptione* [*Novels*, LV, chap. i, word *praescriptione*]. For, when that law uses the words, 'notwithstanding any prescription, &c.', the Gloss adds, 'Except one of a hundred years', for one of that length is held to be immemorial; indeed, it adds, 'or one of forty years', which is considerable. The import of these words is that whenever a custom is revoked by a law, or a prescription is rejected, the law is to be understood as referring to an ordinary custom, or to a prescription that has run for a 'long time', but not to one that has been observed for the 'very long time', much less to one that is immemorial. Thus also, the civil laws say that discontinuous servitudes cannot be acquired by prescription (*Digest*, VIII. i. 14); nevertheless, this rule does not hold in the case of immemorial prescriptions—and this, without taking into account *Digest*, XLIII. xx. 3, § 4. That law provides us with a basis for proving our assertion almost as strong [as that just cited]. The reasoning here is that, since nothing is known of the beginning of the custom there referred to, so neither is it known whether that right was established by usage alone, or whether it owes its origin to some other cause, such as a privilege, a constitution, or the like. And it is to be noted, for this reason, that a custom of that sort is not abrogated by a law referring in a general way to 'custom'; for the custom of which we treat has a certain superiority of character.

Covarruvias. Tiraqueau.

Gloss.

It is to be added, that it is for this reason that an immemorial custom has a very special status in law, and carries with it many special privileges; and is, therefore, in accordance with another well-attested interpretation not affected by a general [revocating] clause. Therefore, this opinion can be adopted in practice. Certain conditions, which have to do with the matter of prescription, are commonly set down for the validity of this rule; these, however, we need not rehearse here. They are to be found in the passage of Tiraqueau, cited earlier [*De Utroque Retractu*, Preface, nos. 19 *et seq*].

The first conclusion approving this third opinion.

Tiraqueau.

19. Our second main conclusion must be that an ancient custom may be abrogated by a subsequent one, when due proportion is observed; that is, a universal custom by a universal one; and a particular custom by a particular one of the same locality—for customs of different

The second conclusion: an ancient custom may in due proportion be abrogated by a subsequent one.

places are not contrary, the one to the other. There may be a derogation, however, from a universal custom by a particular custom of a certain place; and, finally, a custom universal within a certain locality can derogate from a particular one. These conclusions are almost the same as those defended by Hostiensis (in *Summa*, Bk. I, rubric iv, no. 10) and all other writers on this question.

Hostiensis.

The general proof for this thesis is that in this way customs are compared with one another, just as laws and[1] customs are compared, respect being paid to due proportion between the cases. Thus, in the *Institutes* (I. ii, § 11), we find it stated that, 'The laws which are made by a state are wont often to be altered either by the tacit consent of the people, or by the enactment of a subsequent law.' And just as this is true of rules established by written law, so is it *a fortiori* true of those introduced by unwritten law; for it would seem that a tacit consent 865 is more likely to be changed by a contrary tacit consent, than that an express consent should be changed by a tacit one: yet such can be the case, as we have proved. Therefore, . . .

It is, therefore, most important that the customs be truly contrary to each other; for if they can be brought into harmony, they are, as Hostiensis says, both to be followed. Once we assume their mutual opposition, however, then all parts of our assertion are evident.

Hostiensis.

Touching the last assertion in our thesis, it is to be noted that there can be no derogating clause attached to a custom, because customs consist of actions, not of words; and that it is for this reason necessary that a universal custom, in order to derogate from a particular one, must be extended to the locality where the latter formerly prevailed. When that takes place, the fact of the derogation is then clear; for contradictory opposition (so to speak) is then perfected, and the people themselves have given their consent. The custom will not have this effect if it remains general only in the other portions of the province or kingdom; for in that case a universal custom cannot be prejudicial to a particular custom to which the people strongly cling, any more than a universal law can derogate from such a custom.

20. It may be asked, what duration is necessary and what number of acts is called for that a subsequent custom may derogate from an earlier one. Our reply must be that neither one nor many contrary actions are sufficient, but that a custom validated by prescription is necessary, or one such as is sufficient for the revocation of a written law. Thus the Gloss 2 (on *Digest*, L. xvii. 171, 166[54]) is to this effect. This is the doctrine also of Hostiensis (on *Decretals*, Bk. I, tit. iv, no. 5, § *qualiter*, words *sed numquid*); of Panormitanus (*De Consuetudine*, Chap. xi, no. 19); of Rochus (*De Consuetudine*, Sect. 4, nos. 69 *et seq.*

Of the time and the actions required for the revocation of a custom.

Gloss. Hostiensis. Panormitanus. Rochus.

[1] [Omitting *vel* in the text.—Reviser.]

[nos. 74 *et seq.*]); and of Felinus (on *Decretals*, Bk. I, tit. ii, chap. viii, no. 30, at end), where in a scholion the names of many other authorities are given.

Felinus.

The reason here is that no custom can establish new law, unless it is itself validated by prescription, or has the approbation of the prince's consent; and consequently, no custom can abrogate a previous custom, unless it have the same consent of the prince. Therefore, a period of at least ten years is required for abrogation, if the prince has no knowledge of the custom; or a period to be fixed by the judgment of prudent men, if the prince has knowledge of the new custom.

21. It may also be asked, whether a period of forty years is required in ecclesiastical customs in order to effect the revocation of earlier customs. Panormitanus states without reference to a distinction of customs that an observance of ten years is sufficient; and Felinus follows his doctrine. The latter gives as his reason that the later custom is not one contrary to law. This assertion he proves as follows: because either the first custom was contrary to law, and the subsequent one is according to the older law, which had been revoked by the first, and thus a reversion to the more ancient law is facilitated; or, the first custom was outside the law, and so the subsequent custom will be a custom of the same kind: and therefore a period of ten years will always be sufficient for the subsequent custom. Rochus does not approve of this argument (*ibid.*), nor does Barbatia [*Repertorium, De Consuetudine*], and I, also, find it difficult to accept, because it does not take into account at all the character of unwritten law.

Rochus. Barbatia.

My opinion, therefore, is, briefly, that if the prior custom was not contrary to the law, but was outside the law, then the subsequent custom will be in absolute opposition to the law, and will therefore demand an observance of the length of time necessary for a canonical prescription. The proof is that the former custom established a legal rule to which the later custom is opposed, nor is it in conformity with any existing law. Likewise, if the prior custom was universal, and the later one was particular, then the truth of my assertion is the more evident, since a universal custom establishes general law. The same thing seems to be true if the earlier custom were a particular custom of that locality, and not in opposition to the general law. For a custom contrary to statutes of the character described above would be in opposition to the law, and would require an observance of the length of time necessary for a canonical prescription. Therefore, the same is true of a custom, for the principle is the same in both cases.

The time required in the case of a canonical prescription, and likewise where one custom derogates from another.

If, however, the prior custom was opposed to general law, which was not completely abolished by that earlier custom—for the reason that the custom that derogated from it was not a universal, but a particular one—then it is probable that a subsequent prescriptive custom, of ten years' standing, is sufficient. The reason for this is that this prescriptive custom is not of its essence opposed to the law, since the general law, to which a return is made by this custom, always stands. In that case the argument of Felinus stands [on *Decretals*, Bk. I, tit. II, chap. viii, no. 30].

When the period of ten years is sufficient.

Felinus.

I could not approve it, however, if the prior custom were universal, and had completely annulled the universal law previously existing; for in that case, I think that a canonical prescription of forty years is necessary against such a custom, because the subsequent custom is then completely contrary to the general law established by the previous custom. For any other law more ancient than either custom is as if it had not existed before the other two, because it has been entirely abolished. Let this suffice for our treatment of custom.

When forty years are required.

[The Title-Page of the Edition of 1613]

A DEFENCE OF THE
CATHOLIC AND APOSTOLIC FAITH
IN REFUTATION OF THE ERRORS OF THE ANGLICAN SECT
WITH A REPLY
To the APOLOGIE FOR THE OATH OF ALLEGIANCE
and to the admonitory Preface of
His Most Serene Majesty James, King of England
By
FATHER FRANCISCO SUÁREZ
of Granada, Member of the Society of Jesus
Primary Professor of Sacred Theology at the celebrated Academy of Coimbra
Dedicated to Their Most Serene Majesties
the Catholic Kings and Princes of all Christendom

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